Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF NAPA,

Petitioner,

v.

VIOLET M. SCHUTT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May an employer in a Title VII action for disparate treatment discrimination, based on an interracial relationship, be deprived of summary judgment where the employee merely challenges the employer's employment decision as being pretextual and relies on her prima facie case for an inference of discrimination, without presenting evidence, direct or indirect, that the decision was motivated by discriminatory intent?

2. May discriminatory intent in a Title VII action for disparate treatment necessarily be inferred from the employee's inclusion in a particular protected class such as interracial relationship?

3. May a circuit court properly deny *en banc* review where there is an irreconcilable conflict among prior decisions within its circuit?

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PETITION FOR WRIT OF CERTIORARI

The County of Napa respectfully petitions for a writ of certiorari to review the decisions reversing summary judgment and denying rehearing of the United States Court of Appeals for the Ninth Circuit in this case.

I.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The opinion of the court of appeals (App., *infra*, 1-4) is unpublished but referenced at 1996 U.S. App. LEXIS 34012. The order denying rehearing and rejecting suggestion for rehearing *en banc* (App., *infra*, 5) is also unpublished. The opinion of the district court and judgment (App., *infra*, 6-31) is unpublished but referenced at 1995 U.S. Dist. LEXIS 12033.

II.

JURISDICTION

The opinion of the court of appeals was filed and entered on December 30, 1996. Thereafter, a timely petition for rehearing and suggestion for rehearing *en banc* was filed. The court of appeals denied rehearing and rejected the suggestion for rehearing *en banc* on February 13, 1997.

The statutory provision believed to confer jurisdiction on this court is 28 U.S.C. § 1254(1). The jurisdiction of this court is invoked pursuant to Supreme Court Rule 10(a) and (c) and Rule 11.

III.

STATUTORY PROVISION INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., the full text of which is set forth in the Appendix (App., *infra*, 32) pursuant to Supreme Court Rule 14.1(f).

IV.

STATEMENT OF THE CASE

A. General Overview

This case presents significant questions about the correct interpretation of the *St. Mary's Honor Center v. Hicks*,[1] decision and the application of the *McDonnell Douglas-Burdine*[2] analysis to summary judgment proceedings.

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.,[3] and under 28 U.S.C. § 1367.

Respondent is a white woman who became romantically involved with a married black male co-worker while both were employed as correctional officers at the

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[1] 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), hereinafter referred to as *"St. Mary's"*.

[2] Full cites as, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981)

[3] Hereinafter referred to as "Title VII."

Napa County jail. After respondent was released from employment during her probationary period, she brought suit against petitioner claiming that she was unlawfully terminated due to her interracial relationship. Her lawsuit also included claims for harassment and discrimination based upon gender and marital status. The district court granted summary judgment in favor of petitioner on all claims. On appeal, the court of appeals affirmed on four grounds but reversed and remanded as to respondent's claim that she was unlawfully terminated because of her interracial relationship.

B. Material Facts

Respondent Violet Schutt, a white woman, worked as a correctional officer for the Napa County Department of Corrections ("DOC") at the county jail from July of 1991 until March 31, 1993[4] when she was released from employment because she did not satisfactorily pass probation. The two events which prompted her release were her refusal to obey a direct order of her supervisor and her resistance to working the hours she was needed.

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[4] From July of 1991 through April of 1992, she was an extra-hire correctional officer which was tantamount to an on-call position. She worked on an as-needed basis with no set team, no set shift, no preassigned post, no guarantee of minimum hours, no benefits, no sick or vacation leave and no guarantee of continued and/or permanent employment. From April of 1992 through March of 1993, she was officially a half-time officer but worked full-time hours because she desired ultimately to be a full-time officer.

Earlier on the day of her release, respondent's supervising correctional officer, Ms. Terry Rose ("Rose"), assigned her the position of Fire/Life/Safety Officer at the jail because she determined that respondent should interact more and develop her communication skills with her co-workers. The Fire/Life/Safety position was characterized as extra duty but was a routine assignment which each correctional officer was expected to accept and fulfill during the course of his/her employment. Neither respondent nor any other officer was singled out for assignment.

With only a little more than a week to go until the end of her probationary period, respondent refused to accept the assignment, stating that she did not want more responsibility. She understood that Rose had authority to assign the position to her regardless of whether she wanted it. In fact, approximately two months previously, Rose had assigned her the position but withdrew it when respondent began working a modified schedule.

Respondent claims that the March 31 assignment to her was somehow unwarranted because it had recently been given to another officer. In opposition to petitioner's motion for summary judgment, respondent submitted an unauthenticated memo which referenced Rose's assignment to the other officer. Respondent did not depose Rose in this action and did not otherwise investigate the circumstances leading to assignment of the position to her.

Following respondent's refusal of the assignment, Rose met with and discussed the issue with Dan Cunningham ("Cunningham"), the Assistant Director of the

DOC. Because he wanted a better understanding of the reasons for the refusal, he called respondent into his office on March 31. Respondent continued to refuse the assignment, explaining that she did not want more work and responsibility prior to the end of her probationary period, despite Cunningham's offer to give her whatever time or other assistance she needed to perform the assignment. She continued to refuse the assignment even after Cunningham informed her that refusal to accept it was a violation of a direct order of her supervisor, constituted insubordination and was grounds for termination.

During the same March 31 meeting, Cunningham, Rose and respondent also discussed the status of and continuing need for respondent's modified work schedule. In January of that year, there had been a departmental-wide shift rotation so that officers who had been working 6:00 a.m. to 6:00 p.m. traded shifts with those who had worked from 6:00 p.m. to 6:00 a.m. As a result, respondent's team[5] began working from 6:00 a.m.

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[5] There were four teams (A,B,C, and D) comprised of approximately 9 to 13 officers each, some of whom were full-time officers and others half-time officers. Each team had a supervising correctional officer (SCO) who was in charge of the team, a correctional officer III (COIII) who also acted in a supervisory capacity but was junior in command to the SCO, and correctional officers I (COI) and II (COII) who were line staff and possessed no supervisory authority unless specifically assigned the position of watch commander or lead officer. Each of the four teams was assigned either the dayshift (6:00 a.m to 6:00 p.m.) or the nightshift (6:00 p.m. to 6:00 a.m.) for certain days of the week. Every six months there was a shift rotation so that the two teams which had previously worked the dayshift would rotate to the nightshift and visa versa.

to 6:00 p.m. Three days after the rotation, respondent requested a modified schedule so that she could start work at 10:00 a.m. rather than 6:00 a.m. because her son had asthma and it was difficult for him to rise early in the morning during the winter months. She represented that she would need the modified schedule for two months. Based upon her representations, her request was authorized.

Although respondent was officially a half-time employee and guaranteed a minimum of 20 hours per week, she routinely worked 40 hours per week through the January rotation since it was her intention, as it had been throughout her employment, to be a full-time officer and work full-time hours.

When, during the March 31 meeting, respondent was questioned about the fact that the original two-month period had elapsed and was informed about the DOC's needs for coverage from 6:00 a.m. to 10:00 a.m. when activity at the jail was high, respondent advised that she wanted to maintain her 10:00 a.m. starting time. Cunningham offered options – that she return to her original shift, begin a six-hour shift (official half-time minimum shift) at 6:00 a.m. rather than 10:00 a.m. or transfer to another team with a different starting time – but respondent resisted and said that she did not care about the DOC's needs or the other employees.

Thereafter, Cunningham and Rose discussed respondent's insubordinate attitude with John Pearson ("Pearson"), the Director of the DOC. The decision was subsequently made to release her from employment for failure to satisfactorily complete her probationary period.

She was informed in writing on March 31, 1993 that her last day of employment would be April 9, 1993. However, she did not return to work after March 31, 1993.

Respondent admits that she refused to follow the order given by Rose and that she did not want to work regular shift hours or another modified schedule which would meet the needs of the jail. She further admits that she was told, prior to her release, that her conduct was grounds for termination. Although no other reasons were given and respondent produced no contrary evidence, she claims that she was terminated because she was having a relationship with a black co-worker.

In February of 1992, respondent developed a romantic relationship with Ronald Perkins ("Perkins"), a black male co-worker, who was then and reportedly still is married to someone else. Although she claims they sought to keep the relationship confidential, respondent admits having told at least one other officer.

In June of 1992, respondent learned she was pregnant with Perkins' child and underwent an abortion in July of 1992. She claims that her problems with the DOC, specifically with members of the team to which she was then assigned, began in July and August of 1992 after her relationship with Perkins and the abortion became known. At her deposition, she testified that she had difficulties while on the team which consisted of sexual comments (some of which were directed to her and some of which were not) and racial comments (none of which was directed at her), undesirable scheduling decisions, assignment of needless or unwanted tasks, job criticism, failure to acknowledge radio transmissions, being

ignored and officers keeping "book" on her. She also described one episode in which she found black ink and whiteout in her mailbox, but she could not specify a date and did not know who was responsible for them. Except for a few isolated events, she did not report these difficulties to anyone in a supervisory capacity and admitted that she did not know why they were done or whether they had anything to do with her relationship with Perkins.

In the Fall of 1992, following the difficulties, respondent made a formal request to Pearson for a transfer off her team. She later provided Pearson with hand-written notes and type-written memos describing the few reported incidents.[6] Her only reasons for wanting a transfer were those set forth in the memos she prepared and gave to Pearson, none of which made any specific reference to sexual or racial discrimination or harassment. While one memo generally mentioned Perkins, it gave no details despite respondent's subjective belief that the difference in her treatment by team members was because of her interracial relationship.

In September of 1992, following respondent's request for a transfer and receipt of her notes and memos, Pearson requested John Alexander ("Alexander"), a Correctional

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[6] One of the incidents involved a verbal altercation between another officer and an inmate which respondent witnessed and felt was mishandled. She did not want to work again with that officer, raising the inference she was intimidated. A second incident occurred when an inmate backed her into a corner and attempted to intimidate her but which did not involve other officers.

Officer III, to transfer to respondent's team and conduct an investigation to ascertain the nature and extent of the difficulties she reported. As part of his investigation, Alexander interviewed all members of the team, the majority of whom reported that respondent was easily intimidated and could not be counted on for backup. Most of the officers further reported that they had no concerns about respondent's dating a black man. Although respondent and one other officer felt there were racial overtones, neither could provide Alexander with any example or point to any statement to support that feeling.

On or about September 26, 1992, Pearson received Alexander's written investigative report and decided that it would be best to transfer respondent to another team given her request and her team members' lack of confidence in her. She was subsequently placed on a team supervised by Christopher Brockway ("Brockway"). Following the transfer, she had no further difficulties with any member of her prior team. She did experience lesser difficulties (isolated sexual comments not directed at her) with one new team member, but she did not report them. In fact, she admitted that most of her new team members were helpful and informative.

Some time in late December 1992 or early January 1993, Brockway prepared a partial and unauthorized evaluation of respondent recommending her for permanent status and submitted it to Cunningham for review and approval. Cunningham had only just joined the DOC in approximately November of 1992 and had not had an opportunity to review respondent's performance. Because he, as Assistant Director, had not initiated the evaluation process, as was the DOC's policy, and had not

authorized the particular evaluation, he instructed Brockway to discontinue the process and to advise respondent. The partial evaluation form, presumably containing Brockway's writing, was never authenticated during discovery, nor did respondent depose Brockway or obtain a declaration from him to ascertain the circumstances surrounding the evaluation. Respondent presented no evidence to show that rejection of the unauthorized evaluation by Cunningham, who had not been involved in respondent's earlier difficulties with her team members or the related investigation, had any causal connection to her interracial relationship with Perkins.

C. Proceedings Below

Respondent filed her complaint in the Northern District Court in California on June 14, 1994, seeking damages and injunctive relief against petitioner for violation of Title VII. In the body of the complaint, she asserted that she was harassed and subjected to disparate treatment discrimination based upon her gender, marital status and interracial relationship with a black male coworker. As a part of her action and through supplemental jurisdiction under 28 U.S.C. § 1367, she also asserted a state claim for breach of employment contract. She had previously filed an EEOC/DFEH complaint on or about April 27, 1993 and was issued a right-to-sue letter on March 17, 1994.

On July 7, 1995, upon completion of substantial discovery and two days after the court-imposed discovery cut-off, petitioner filed its motion for summary judgment

which was supported by declarations from Pearson, Cunningham, Alexander and Rose. The motion addressed the following four issues: (1) respondent failed to exhaust her administrative remedies as to any claims of discrimination and/or harassment based on gender and marital status; (2) respondent failed to establish a prima facie case of discrimination, and petitioner advanced legitimate, nondiscriminatory reasons for its employment decisions; (3) respondent failed to establish the existence of any actionable sexual and/or racial harassment; and (4) respondent had no claim for breach of contract. In her opposition, respondent attempted to include discriminatory retaliation as one of her theories of recovery although it was not asserted in her complaint. Thus, five issues were presented to the district court.

The district court issued its written order granting petitioner's motion for summary judgment in its entirety on all five issues on August 15, 1995 and entered judgment the same date. In short, it agreed that respondent had failed to exhaust her administrative remedies, that she had not presented a meritorious claim for retaliation and that the totality of the circumstances did not support the existence of a hostile work environment. As to the claim for disparate treatment discrimination, the district court found that respondent had only minimally made out a prima facie case of discrimination, that petitioner had come forward with legitimate, nondiscriminatory reasons for its actions and that respondent had failed to present any specific evidence that petitioner's reasons were unworthy of credence or that it was motivated by race in its decision to terminate her.

Respondent filed her notice of appeal on September 14, 1995, and the matter was argued before the Ninth Circuit on November 7, 1996. On December 30, 1996, the court issued its memorandum of decision. It affirmed summary judgment on four grounds but reversed and remanded as to respondent's claim that she was unlawfully terminated because of her interracial relationship. The court determined that a question of fact existed as to whether petitioner's reasons for the termination were pretextual,[7] reaffirmed its holding in *Washington v. Garrett*[8] that a showing of pretext without more was sufficient to defeat summary judgment and concluded that it was inappropriate for the district court to consider on summary judgment whether respondent presented evidence that petitioner was motivated by discriminatory intent inasmuch as it was a question to be decided only by the factfinder.

On January 13, 1997, petitioner filed a petition for rehearing and suggestion for rehearing *en banc* on three main grounds: (1) the panel's decision contravened the substantive law of *St. Mary's*; (2) it conflicted with prior decisions within the Ninth Circuit; and (3) it conflicted with decisions from a number of other circuit courts. On February 13, 1997, the Court of Appeals issued its order denying rehearing and rejecting the suggestion for rehearing *en banc*.

This petition for writ of certiorari followed.

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[7] Citing Rose's prior assignment of the Fire/Life/Safety position to another officer and Brockway's unauthorized evaluation.

[8] 10 F.3d 1421 (9th Cir. 1993)

V.

REASONS FOR GRANTING THE PETITION

Despite this Court's decision in *St. Mary's* and the guidelines it established for analyzing disparate treatment discrimination cases brought under Title VII, courts in all circuits across the United States have cataclysmically divided in their interpretation of the decision and application of its guidelines which has, in turn, produced inconsistent results from circuit to circuit and put employees and employers in vastly different positions depending solely on where in the country they live or do business. These inter-circuit conflicts have arisen most frequently in summary judgment proceedings, where the need for clear and efficient jurisprudence is greatest,[9] but on which there is no definitive Supreme Court authority and which *St. Mary's* did not directly address.

Sources outside the judiciary have confronted the subject and tried to give meaningful guidance but have not resolved the continuing conflict. The Equal Employment Opportunity Commission has interpreted *St. Mary's* in a way which conflicts with how a number of circuit courts have read and applied the decision.[10] Standards it has fashioned for use in Title VII cases, based on its interpretation of the decision, are followed in some instances but not in others. Legislative attempts to clarify *St. Mary's* and prior Supreme Court decisions, including amending Title VII and even overturning *St. Mary's*, have

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[9] See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2276 (1995)

[10] See Equal Employment Opportunity Act Notice, 915.002 (April 12, 1994) (App., *infra*, 33-46)

similarly been unsuccessful.[11] Several legal scholars have authored extensive commentaries on *St. Mary's* as well, offering divergent views on its meaning and practical effect, particularly in cases involving summary judgment.[12]

In the end, confusion, not clarification, has proliferated, leaving the every-day practitioners and parties in a state of frustration and despair. The need for guidance from this Court is more acute than ever. This case gives this Court the timely and appropriate opportunity to resolve widespread confusion, eliminate recurring conflicts, provide much-needed guidance and consistency from circuit to circuit and harmonize *St. Mary's* with *Celotex Corp. v. Catrett*.[13] Moreover, this case represents a

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[11] See Employment Discrimination Evidentiary Amendment of 1993, H.R. 2787, 103d Cong., 1st Sess. (July 28, 1993); Disparate Treatment Employment Discrimination Amendment of 1993, H.R. 2867, 103d Cong., 1st Sess. (Aug. 4, 1993); Civil Rights Standards Restoration Act, S. 1776, 103d Cong., 1st Sess. (Nov. 22, 1993); and, Civil Rights Standards Restoration Act, H.R. 3680, 103d Cong., 1st Sess. (Nov. 22, 1993) (App., *infra*, 47-58)

[12] See Michael J. Lambert, *St. Mary's Honor Center v. Hicks: The "Pretext-Maybe" Approach*, 29 New Eng. L. Rev. 163 (1994); Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and Its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251 (1994); and, *Developments-Employment Discrimination*, 109 Harvard L. Rev. 1568 (1996); see, also Catherine J. Lanctot, *The Defendant Lies and The Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule In Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991)

[13] 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

prime example of where intervention and clarity is necessary to correct an erroneous decision on issues of national importance.

A. The Ninth Circuit's Interpretation And Application Of Step Three Of The *McDonnell Douglas-Burdine* Analysis Conflicts With *St. Mary's* And Decisions From The First, Second, Fourth, Fifth, Sixth And Tenth Circuits And Aggravates The Existing Conflict Within Its Own Circuit

1. Conflict With *St. Mary's* And Other Circuits

St. Mary's was decided to address the then-existing inter-circuit conflict as to whether a plaintiff who proves a prima facie case of disparate treatment discrimination and convinces the factfinder to reject the employer's stated justification is entitled, on that basis alone, to judgment as a matter of law. After an exhaustive discussion of *Burdine* and *McDonnell Douglas*, this Court held that judgment for the plaintiff was not required and emphasized that once the employer has articulated a legitimate, nondiscriminatory reason for its employment decision, the presumption created by the prima facie showing is rebutted, thus "dropp[ing] out of the picture", and plaintiff must then come forward not only with evidence that the employer's articulated reason was pretextual but also evidence that it was a pretext for unlawful discrimination.[14] To that end, the court declared that the "plaintiff must show *both* that the reason was false, *and*

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[14] 509 U.S. at 507-508, 510-511, 515

that discrimination was the real reason."[15] Critical to its holding was that disparate treatment under Title VII involves intentional discrimination on which plaintiff has the ultimate evidentiary burden.[16]

Substantial controversy has, nonetheless, developed over whether *St. Mary's* did, indeed, establish what previously had been termed the "pretext-only" or "pretext-plus" standard[17] and what measure of evidence now will satisfy step three of the analysis, primarily because of the following language from the decision:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, (footnote omitted) and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*," 970 F.2d, at 493 (emphasis added).[18]

Relying exclusively on the above passage, but ignoring the very core of *St. Mary's*, the Ninth Circuit adhered to the pretext-only standard in deciding *Washington v.*

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[15] *Id.* at 511, n.4

[16] *Id.* at 507-508, 511, 515, 517

[17] Catherine J. Lanctot, *The Defendant Lies and The Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule In Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991)

[18] 509 U.S. at 511

Garrett.[19] By its interpretation, *St. Mary's* stands for the proposition that:

> [E]ven when the plaintiff is successful in demonstrating, pursuant to the *McDonnell Douglas* framework, that the employer's proffered reason is pretextual, the factfinder is not compelled to render a finding of unlawful discrimination. The opinion makes clear, however, that the factfinder *may* infer discrimination from the showing of pretext:. . . . [20]

Determining that its approach was "in accord" with *St. Mary's*, it concluded:

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.[21]

Unfortunately, and for reasons which are not clear, none of the most compelling or key language from *St. Mary's* is analyzed, discussed or even touched upon. The practical effect of this decision – and one that is entirely inconsistent with *St. Mary's* – is that plaintiff may continue to rely on a prima facie *presumption* after it has

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[19] But see, conflicting Ninth Circuit decisions discussed *infra* at pp. 21-22

[20] 10 F.3d 1433

[21] *Ibid.*

already been rebutted to gain an *inference* of intentional discrimination even in the absence of sufficient and admissible evidence showing, directly or indirectly, discriminatory animus.

It is *Washington v. Garrett* which supported the Ninth Circuit's reversal of petitioner's motion for summary judgment on the issue of respondent's termination. However, neither *Washington v. Garrett* nor the Ninth Circuit's decision below is in accord with decisions reached in five other circuits, all of which have adopted either the pretext-plus standard or another variation consistent with *St. Mary's*. Had petitioner been before any of these other circuits, it is fairly certain it would have prevailed on summary judgment.

The First, Fourth, Fifth and Sixth Circuits have categorically rejected the pretext-only standard as applied to the third step of the *McDonnell Douglas-Burdine* analysis and held that in order to survive summary judgment, a plaintiff must do more than attack the defendant's employment reason as being pretextual and turn to the prima facie case for an inference of discrimination. Based on these circuits' reading of *St. Mary's*, the plaintiff must produce sufficient evidence to support a finding that the defendant's reason is pretextual *and* that the true reason is a pretext for illegal discrimination.[22] This standard,

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[22] *Goldman v. First Nat. Bank of Boston*, 985 F.2d 1113 (1st Cir. 1993); *Vega v. Kodak Caribbean, LTD.*, 3 F.3d 476 (1st Cir. 1993); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1958 (1995); *Mitchell v. Data*

they reason, comports not only with plaintiff's ultimate burden of proving intentional discrimination but the burden plaintiff has at the summary judgment stage to come forward with definite, competent evidence which creates a genuine issue of material fact on every element essential to the case in chief. Where the plaintiff raises a factual dispute as to the pretext prong but does not do so as to the companion prong of producing evidence of intentional discrimination, summary judgment in favor of the employer has been affirmed.

The Tenth Circuit, although not as definite as the First, Fourth, Fifth and Sixth, has likewise required a more substantial showing than pretext only on the plaintiff's part to overcome summary judgment.[23] It recognized that some amount of evidence – whether direct or circumstantial and whether part of what comprises the prima facie showing or independent – must be offered by the plaintiff to support the finding that the employer's reason was a pretext for discrimination.[24]

General Corp., 12 F.3d 1310 (4th Cir. 1993); *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995); *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 380 (1995); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), *cert. denied*, 112 S.Ct. 198 (1991); *Gagné v. Northwestern Nat. Ins. Co.*, 881 F.2d 309 (6th Cir. 1989); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994); see also, *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993)

[23] *Durham v. Xerox Corp.*, 18 F.3d 836 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 80 (1994) (summary judgment for the employer affirmed)

[24] *Id.* at 840

The Third, Eleventh and District of Columbia Circuits do not require any showing at step three of the analysis other than pretext.[25] As such, summary judgment is a rarity and often unattainable for an employer even were there is no evidence of a causal connection between its employment decision or the pretextual reason and unlawful discrimination and even where the pretext is otherwise benign.[26]

The conflict within the circuits – which by all accounts is diametrically opposed – is certain to continue and will arguably affect more cases than those which are officially reported.[27] There is no realistic or pending prospect for resolution of the conflict[28] without a decision by this court at this time.

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[25] *Waldron v. SL Industries, Inc.*, 56 F.3d 491 (3d Cir. 1995); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 355 (1994); *Hairston v. Gainsville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993); *Batey v. Stone*, 24 F.3d 1330 (11th Cir. 1994); *Howard v. BP Oil Co., Inc.*, 32 F.3d 520 (11th Cir. 1994); but, see, *Walker v. Nationsbank of Florida*, 53 F.3d 1548 (11th Cir. 1995); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted on other grounds*, 116 S.Ct. 805 (1996); and, see also *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994) (which adopts a hybrid version of the pretext-only standard)

[26] See *Developments-Employment Discrimination*, 109 Harvard L. Rev. 1568, 1596

[27] See Peter Siegelman and John J. Donohue, III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 Law & Socy. Rev. 1133 (1990) (study performed demonstrated that 80%-90% of employment discrimination cases filed in federal court do not produce a published opinion.)

[28] It appears that the Solicitor General indicated in its brief to the Supreme Court concerning the petition for writ of

2. Conflict Within The Ninth Circuit

Petitioner sought rehearing and suggested rehearing *en banc*, in part, to enable the court of appeals to resolve the existing conflict within its own circuit as to the appropriate third step standard on summary judgment. However, it declined despite its ruling that *en banc* review must be granted to resolve an irreconcilable conflict.[29]

The holding in *Washington v. Garrett* – argued and briefed before *St. Mary's* but decided afterwards – and the standard it applied is in direct conflict with no less than five other decisions rendered in the Ninth Circuit[30] before the decision in this case. In all five cases, the plaintiff was required to show substantial and/or significantly probative evidence of discriminatory animus. Contrary to *Washington v. Garrett*, the *Steckl* and *Wallis* panels indicated that the use of summary judgment is proper in appropriate discrimination actions even when the plaintiff has established a prima facie case.

The case which best exemplifies the existing conflict with *Washington v. Garrett* is *Nidds v. Schindler Elevator*

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certiorari filed in *Barbour v. Merrill*, that a resolution of the conflict was forthcoming, but to date that has not occurred.

[29] See *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-1479 (9th Cir. 1987); *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992)

[30] See *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); *Sakellar v. Lockheed Missiles and Space Co.*, 765 F.2d 1453 (9th Cir. 1985); *Schuler v. Chronicle Broadcasting Co., Inc.*, 793 F.2d 1010 (9th Cir. 1986); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994); and, *Nidds v. Schindler Elevator Corp.*, 103 F.3d 854 (9th Cir. 1996)

Corp. – decided only six days before the decision was issued in this case – in which the Ninth Circuit unequivocally adopted the two-pronged pretext-plus standard as reflected by the following passages:

> To show that an employer's reason is pretextual, plaintiff must show both that it is false, and that discrimination was the real reason.
>
> . . .
>
> However, the Supreme Court has made it clear that the plaintiff must do more than show that the reason given was false; he must also offer some evidence that the real reason was discriminatory.[31]

This two-pronged standard – although applied as one in its entirety by the district court below – was not the same one applied to respondent by the Ninth Circuit and, in fact, was rejected by the court.

Given the Ninth Circuit's intra-circuit split and the court's unwillingness to resolve it, it is necessary for this court to intervene to establish uniformity.

B. The Issues Presented By This Petition Are Important And Of National Concern

Title VII is not important nationally merely because it has generated substantial litigation and corresponding case law – albeit conflicting – but also because it affects

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[31] 10 F.3d 859

the entire working populous in some way, shape or manner, integrating social and legal objectives.[32] The framework for applying it must be clear and uniform to all; otherwise, it will undoubtedly have much different implications and perhaps harsher obligations from person to person and employer and to employer. That an employer discriminated is a serious accusation which should be supported by just as serious evidence. To treat Title VII defendants differently from other civil defendants by permitting liability without adequate proof serves no purpose than denigration of employers as a whole.

Equally important is a party's right to avail itself of the summary judgment process so that it may "isolate and dispose of factually unsupported claims."[33] Thus, where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, summary judgment should be granted.[34] This Court has approved the summary judgment procedure and expressly stated that it is not a disfavored procedural shortcut but an integral part of the Federal Rules designed to secure the just, speedy and inexpensive determination of every action.[35]

The use of summary judgment by an employer is particularly important in disparate treatment cases where

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[32] See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403, 483 (1983)

[33] *Celotex Corp. v. Catrett*, 477 U.S. 323-324

[34] *Id.* at 332

[35] *Id.* at 327

litigation is frequently protracted and enormously expensive, especially for public entities in California which already suffer from serious lack of revenue and are increasingly being forced to cut services and programs. To complicate matters, public entities and law enforcement agencies, as a whole, suffer a double blow because they are relatively easy and constant targets when issues of discrimination are involved.

It makes legal and practical sense that summary judgment be equally available to employers in disparate treatment cases and granted where the employee fails to present sufficient evidence to support the most essential part of her case – intentional discrimination. The fact that discriminatory intent or motive is at issue should not be a bar since they do not preclude summary judgment in other civil proceedings.[36] Yet, the position adopted by the Ninth Circuit in this case and in *Washington v. Garrett* as well as by the Third, Eleventh and District of Columbia Circuits differentiates between civil litigants, disfavors the employer and deprives it of summary judgment when the issue of discriminatory animus arises.

The evidence which supports a prima facie showing does not necessarily bear on the ultimate and essential element of intentional discrimination that every Title VII plaintiff in disparate treatment cases has. To allow a plaintiff to defeat summary judgment at the pretext stage by turning to the prima facie case for an inference of discrimination – even where the prima facie evidence

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[36] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)

does not directly or indirectly support it – makes the entire *McDonnell Douglas-Burdine* analysis worthless and essentially does away with summary judgment for an employer in Title VII cases. The practical result – similar to that criticized by the *St. Mary's* majority – is that the employer loses if its employment reason is found to be incorrect whether or not it is guilty of racial discrimination.[37] In the end, potentially unmeritorious and unsupported cases continue, public funds are drained and courts are congested.

The racial overtones involved in this case make the issues likewise important. Racial tension is, according to the majority of media reports since the Rodney King trial and Los Angeles riot of 1992, on the rise in California and ever more acute where a public entity or law enforcement agency is involved. As a component of that tension, interracial relationships and the discrimination reportedly surrounding them have been in the public focus and the subject of noteworthy criminal and civil proceedings in California as well. That tension is at an all-time high is even more recently reflected by the passage of Proposition 209[38] and the public reaction – both pro and con – to it.

To what extent the prevailing political or social climate may affect a party's standing in a Title VII case or influence a judicial decision is unknown but, nonetheless,

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[37] *St. Mary's*, 509 U.S. at 514

[38] Officially entitled "*Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment*" and placed on the November 5, 1996 general election ballot in California (App., *infra*, 59-75).

potential. Whether satisfaction of one element of the prima facie case such as a protected class in and of itself makes the prima facie showing stronger and raises a greater presumption of discrimination is highly questionable but has not been firmly decided.[39] If, in fact, the nature of the protected class can be controlling and can provide a sufficient evidentiary anchor for an inference of discrimination, practitioners and parties must be made aware.

C. The Ninth Circuit's Decision Is Erroneous

Reviewing de novo, the Ninth Circuit did not disturb the district court's ruling on racial or gender harassment, the evidence for which was arguably extensive on both sides. Its reversal was limited to one issue – whether respondent raised a genuine issue of material fact that she was unlawfully terminated in violation of Title VII. Petitioner submits that the Ninth Circuit's decision was wrong because it failed to apply the appropriate summary judgment standard and failed to follow the *McDonnell Douglas-Burdine* analysis set forth in *St. Mary's* and in other cases decided by the circuit.

In short, respondent never demonstrated what made the reasons petitioner gave for her termination pretextual. She did not present evidence that she was terminated for any reasons other than disobedience of a supervisor's order and refusal to work the hours she was

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[39] See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 717 (ultimate focus not on prima facie case but on question of discrimination)

needed. In fact, she admitted these were petitioner's reasons. Her essential challenge to the termination was that it was unfair given the fact that the extra duty assignment had been given to someone else, that she should not have received it during her probationary period even though probation is a time to examine an employee's performance, and that her modified work schedule should have been continued because her son had asthma. Because respondent did not follow the *McDonnell Douglas-Burdine* analytical outline in her opposition to motion for summary judgment or in her appellate brief, it is unclear whether she was using the Brockway evaluation to satisfy an element of her prima facie showing or the pretext element. Her argument, nonetheless, was that the evaluation reflected that she should pass probation and be elevated to permanent status.

The Rose assignment and Brockway evaluation were the only specifically-identified pieces of evidence which led the Ninth Circuit to believe that petitioner's reasons for terminating respondent were pretextual. Although petitioner had objected below that this evidence was not admissible on summary judgment under Rule 56(c) and not probative in any event, the court allowed it all the same. Thus, respondent was permitted to rely on inadmissible evidence to support her evidentiary burden at the critical pretext step.

The court further allowed respondent to bypass her ultimate responsibility on summary judgment of making a sufficient showing of the most essential element of her case – intentional discrimination. Unlike the district court, the Ninth Circuit did not require respondent to produce any evidence, direct or indirect, that she was

terminated due to her interracial relationship with Perkins. It simply concluded that she had raised a question of fact about the pretextual nature of petitioner's reasons for her termination – although neither the Rose assignment nor the Brockway evaluation had any nexus to the relationship – and turn to her prima facie case for an inference of discrimination.

Reliance on the prima facie case is very troubling for two main reasons. First, while petitioner did dispute, and always has disputed, that respondent made a prima facie showing, that showing was, as noted by the district court, minimal at best. The district court strained in deciding that she was qualified for the position of correctional officer and presumed the fourth element altogether. What respondent was left with by the time she reached step three of the analysis was a rebutted and weak presumption of discrimination.

Second, and more importantly, there was absolutely no evidence produced by respondent at the prima facie stage which remotely suggested, directly or indirectly, that the termination had any nexus to the interracial relationship with Perkins. The interracial relationship was not an issue at the March 31 meeting of Cunningham, Rose and respondent, nor did it surface in the later meeting between Cunningham, Rose and Pearson. Neither Cunningham nor Rose was involved in the difficulties respondent had the prior fall before she transferred to a new team. To that end, the most obvious link between the relationship and Rose, Cunningham and the termination was missing.

There was likewise no evidence supporting the prima facie case which tended, directly or circumstantially, to show that the Rose assignment had any causal connection to Perkins or the interracial relationship. While the Ninth Circuit refers to "the previously established tension between Rose and [respondent]" (App., *infra*, 2) – which is not factually described in its decision or supported by anything in the record – to the extent there was any such tension during the three months that Rose was respondent's supervisor, respondent did not tie that tension to anything of a racial nature, let alone the interracial relationship.

This obvious lack of evidence highlights the importance and necessity of the second prong of the third step of the *McDonnell Douglas-Burdine* analysis and demonstrates why the Ninth Circuit's ruling is erroneous. Respondent has no evidence to submit to a trier of fact that her termination was motivated by her interracial relationship. At most, she can argue that her termination was unfair or bad business judgment. But, however unfair or bad a decision it arguably was does not make it actionable under Title VII. Petitioner availed itself of summary judgment to isolate and dispose of this claim for the very reason that it had no evidentiary basis.

Relying on guidelines set forth in *St. Mary's* and other Ninth Circuit decisions, petitioner presumed it had accomplished that objective with respect to the termination, only to learn that a different set of standards applied to it. Had the court of appeals followed *St. Mary's* or the analysis in any one of the other five decisions it previously rendered, it is beyond dispute that petitioner would have prevailed on this issue.

This Court should grant this petition to correct the Ninth Circuit's error.

VI.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIOLET M. SCHUTT, Plaintiff-Appellant, v. COUNTY OF NAPA, Defendant-Appellee.	No. 95-16798 D.C. No. CV-94-02115-SC MEMORANDUM* (Filed Dec. 30, 1996)

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted November 7, 1996
San Francisco, California

Before: HUG, Chief Judge, REAVLEY* and LEAVY, Circuit Judges.

Violet Schutt ("Schutt") appeals from the district court's grant of summary judgment against her in her Title VII action against the County of Napa ("Napa"). In granting summary judgment, the district court ruled in Napa's favor on the following issues: (1) failure to exhaust administrative remedies; (2) breach of contract

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

claim; (3) retaliation in violation of Title VII; (4) hostile work environment in violation of Title VII; and (5) discrimination based on disparate treatment in violation of Title VII. Based on the district court's reasoning, we affirm on the first four issues. We reverse as to the fifth, and remand.

On the claim of discrimination based on disparate treatment, the district court found that Schutt had established a *prima facie* case. Napa limits its argument on appeal to the issue of pretext, and for the purpose of this appeal does not challenge the finding of a *prima facie* case of discrimination. We agree with the district court that Napa proffered legitimate nondiscriminatory reasons for terminating Schutt because she had disobeyed a direct order from a supervisor and did not work the hours when she was needed. Schutt argued below and on appeal that Napa's articulated reasons were pretextual.

Viewing the evidence in the light most favorable to Schutt, we conclude that a rational trier of fact could find that Napa's stated reasons were pretextual. For example, the timing of Terri Rose's ("Rose") demand that Schutt take on extra duty as the Fire/Life/Safety officer is troubling. A week earlier the position had been termed voluntary, and had ostensibly been filled when another officer volunteered for it. Rose's explanation to Schutt that she "was only joking" when she assigned the position to the other officer after he had volunteered, is also troubling and could also be rejected by a finder of fact. Further, asking Schutt, still officially a half-time employee, to take on extra duty just 12 days before her probation ended (and a decision on her status would have to be made), when Rose knew Schutt was concerned about her son's

health and was working a modified schedule, suggests an attempt to force Schutt out. In light of the previously established tension between Rose and Schutt, the favorable evaluation of Schutt by her former supervisor that was the only evaluation of his to be rejected, and Schutt's previously reported problems, a rational factfinder could find Napa's reasons unconvincing.

Here, the district court erred in analyzing the third part of the *McDonnell Douglas* test, where "[t]he burden on summary judgment of a plaintiff asserting disparate treatment under Title VII is . . . to raise a genuine factual issue as to whether the articulated reason was pretextual." *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993). Thus, "[b]ecause . . . the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and [a] showing of pretext without anything more, there will always be [the ultimate] question [of discrimination] for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. *Such a question cannot be resolved on summary judgment.*" *Id.* (emphasis added).

The district court found that Schutt had failed to present evidence as to "*why* these legitimate reasons were pretextual and only served to mask underlying discriminatory intent." Dist. Ct. Op. at 19. However, the court first was required to decide the question of *whether* the reasons were pretextual. Instead, the court moved immediately to the question of whether Schutt came forward with specific evidence that Napa was motivated by racial animus and concluded that she did not.

This is more than a semantic nicety, because the question of motivation may only be decided by the fact-finder after the question of pretext has been resolved. *Garrett*, 10 F.3d at 1433. In essence, the district court failed to decide the pretext issue, and then decided the discrimination question which it was not permitted to reach.

Because there is a genuine issue of material fact as to whether Napa's reasons for terminating Schutt were pretextual, we reverse and remand on that claim.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings. The parties will bear their own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIOLET M. SCHUTT, Plaintiff-Appellant, v. COUNTY OF NAPA, Defendant-Appellee.	No. 95-16798 D.C. No. CV-94-02115-SC ORDER (Filed Feb. 13, 1997)

Before: HUG, Chief Judge, REAVLEY* and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Hug and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Reavley has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIOLET M. SCHUTT, Plaintiff, vs. COUNTY OF NAPA, Defendant.	No. C-94 2115 SC ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT (Filed Aug. 15, 1995)

ENTERED IN CIVIL DOCKET 8/15, 1995

I. INTRODUCTION

Plaintiff brings this action pursuant to Title VII of the United States Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., seeking damages and injunctive relief against defendant for alleged employment discrimination and harassment based on her gender, marital status, and interracial association with a black male co-worker. Plaintiff also asserts a claim for breach of an employment contract pursuant to 28 U.S.C. § 1367. The matter is now before the court on plaintiff's motion for summary judgment and defendant's motion for summary judgment.

II. BACKGROUND

Violet Schutt ("Schutt"), a white female, was hired as an extra-hire correctional officer for the Napa County Department of Corrections ("DOC") by the County of

Napa ("Napa") in July of 1991.[1] On or about March 1992, Schutt was offered and accepted a position as a half-time officer and began in that capacity on a probationary basis. Schutt desired full-time employment. Her initial probation period was to run for six months, thus, ending sometime in the Fall of 1992.

As an extra-hire, Schutt began working split-shifts on the B and D teams.[2] As a general rule, each shift had approximately 11 job posts, including booking, receiving, and master control room, which were individually assigned, according to weekly or bi-weekly schedules, to officers on a team. Although each officer was expected to know the duties of and be rotated through each post, full

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[1] As an extra-hire, Schutt was not considered a full-time or half-time officer. Instead, she worked on an as-needed basis with no set team, no set shift, no pre-assigned post, no guarantee of minimum hours, no benefits, no sick or vacation leave, and no guarantee of continued and/or permanent employment. Her duties were, however, similar to those of officers whose post she was covering.

[2] There were four teams (A,B,C, and D) comprised of approximately 9 to 13 officers each, some of whom were fulltime officers and others who were half-time officers. Each team had a Supervising Correctional Officer (SCO) who was in charge of the team, a Correctional Officer III (COIII) who also held a supervisory position, but was junior in command to the SCO, and Correctional Officers I (CO I) and II (CO II), who constituted line staff and possessed no supervisory authority unless specifically assigned the position of watch commander or lead officer. Each of the four teams was assigned either the day shift (6:00 a.m. to 6:00 p.m.) or the night shift (6:00 p.m. to 6:00 a.m.) for certain days of the week. Every six months there was a shift rotation so that the two teams which had previously worked the day shift would rotate to the night shift and vice versa.

rotation did not always occur with the posts of booking, receiving, and master control room as these posts required a high level of experience and training due to their complexity and security functions. Because extra-hires did not work set shifts or hours, they were not necessarily rotated throughout or trained in all posts.

While working as an extra-hire, Schutt met Ronald Perkins ("Perkins"), a black male co-worker who was and still is married to someone else. In February 1992, Schutt and Perkins became romantically involved, which Schutt alleges was not disclosed to other co-workers. Schutt admits, however, that she told at least one other officer, Denise Henley, of the relationship.

In May 1992, Schutt requested a transfer to the B team because the split-shift hours made it difficult to function and enable her to spend time with her children. Her request was honored and she began working 6:00 p.m. to 6:00 a.m. on the B team.

In June 1992, Schutt learned she was pregnant with Perkins' child and underwent an abortion in July 1992. Schutt claims her problems at work, in particular, the B team, began in July and August of 1992 after her relationship with Perkins became known.

Such problems, according to Schutt, included *inter alia* racial and sexual comments, failure to respond to back-up calls, informal reprimands, breaking confidentiality regarding her abortion, and improper responses to the "Dining Room" incident and "Begley" incident (*inter infra*).

In the Fall of 1992, Schutt made a formal request to John Pearson ("Pearson"), the director of the DOC, for a transfer off the B team. Schutt had approximately three meetings with Pearson in August or September of 1992 to discuss the transfer and certain difficulties she was having on the team. In her meetings, Schutt identified the officers with whom she was having difficulties: Hamzey, Gomez, Gonzales, and Dalpiaz. She later provided handwritten notes and typewritten memos describing the difficulties.

In response to Schutt's complaints, Pearson assigned John Alexander, a CO III, as acting SCO of the B team, because the assigned SCO (Dalpiez) and assigned CO III (Gonzales) were away from work due to medical reasons. Pearson asked Alexander to investigate the nature and extent of Schutt's difficulties with the B Team. Napa claims because Schutt never characterized her problems as discriminatory or harassing, Pearson did not do so either when he assigned Alexander to the B team.

Alexander conducted interviews of all members of the B team. In these interviews, Alexander did ask each officer if there were any problems with Schutt dating Perkins. Alexander's investigation demonstrates that most officers interviewed stated Schutt was easily intimidated and could not be counted on for back-up. Moreover, most of the officers also allegedly stated they had no concerns about Schutt dating a black man. One officer, Laurian Luis, did state she felt tension could exist due to the interracial relationship; however, she could not recall specific examples.

In late September 1992, after Pearson received Alexander's written investigative report, he transferred Schutt, upon her request, to the C team. Following transfer to the C team, Schutt had no further difficulties with the B team. She did experience difficulties, although to a lesser extent, with one member of the C team, co-worker Steve Cravea. The difficulties consisted of sexual comments only, which Schutt did not report to anyone in a supervisory capacity. She admitted the rest of the C Team was very helpful and informative.

On September 24, 1992, Dalpiaz and Pearson met with Schutt to discuss her six-month evaluation and probationary status. DOC informed Schutt that she was not qualified to pass probation and be elevated to permanent status because she lacked booking experience[3] and because DOC was allegedly concerned with her easy intimidation by inmates.[4] Instead, Schutt's probation was

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[3] DOC claims as of September 24, 1992, DOC had not had the opportunity to train or evaluate Schutt in the booking post. Schutt claims she asked repeatedly for booking experience, but was denied the opportunity.

[4] The two primary events that allegedly evidenced Schutt's intimidation by inmates included an incident in the dining room ("Dining Room" incident) and an incident with an inmate named Begley ("Begley" incident). The Dining Room incident occurred on or about August 21, 1992. Schutt was feeding inmates in the dining room with co-worker Curtis Murray, when she was asked by Hamzey to assist in another part of the jail. When she returned to the dining room, Murray was involved in a verbal confrontation with an inmate. Schutt called for back-up, and Hamzey responded, but only after two calls. Schutt allegedly did not want to work with Murray again after this incident due to fear of encountering another aggressive situation. The Begley incident involved a confrontation between

extended for an additional six months until April 11, 1993 pursuant to a Memorandum of Understanding ("MOU").[5] Schutt did not ask whether her probation was being extended because of the overall difficulties she had experienced, but simply felt the extension was for the reasons given.

Following her extension of probation and transfer to the C Team, Schutt received the training in booking she needed, as well as training in assaultive and combative behavior by inmates. On January 20, 1993, Schutt made a written request for a modified schedule so that she could start working at 10:00 a.m., rather than 6:00 a.m.. The request was prompted by her son's medical problems and the change was estimated to last approximately two months. Schutt's request for a modified shift was authorized.

On or about March 31, 1993, Schutt was assigned by Rose, the C Team's SCO, to the position of Fire/Life/Safety Officer within the jail. Schutt informed Rose she could not accept the position. Schutt's testimony states her reason for refusal was that she did not want more responsibility and work prior to the end of her probation. Schutt claims she was singled out for the assignment. In

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Schutt and an inmate Begley. Begley apparently backed her into a corner and "attempted to intimidate her." Schutt denies being intimidated yet documented the incident, describing the situation as intimidating.

[5] The MOU expressly empowers the DOC to extend probation where the DOC had insufficient time to evaluate an employee accurately or where additional probationary time may allow the retention of the employee or for exceptional reasons.

response to Schutt's refusal, Dan Cunningham, Assistant Director of the DOC, called her into his office on March 31, 1993. Schutt continued to refuse the assignment, despite being told she was disobeying a direct order of her supervisor. Cunningham informed her such disobedience constituted insubordination and grounds for termination. At this meeting, Rose and Cunningham also discussed the status and continuing need for Schutt's modified work schedule, which was now beyond the originally requested two months. Schutt still wished to maintain the modified work schedule. Cunningham, Rose, and Pearson discussed Schutt's refusal of Rose's direct order and Schutt's resistance to working the hours needed. The decision was subsequently made to release her from employment, because she had failed to complete satisfactorily her probationary period. Schutt was informed in writing on March 31, 1993 that her last day of employment would be April 9, 1993.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex Corp v. Myrtle Nell*

Catrett, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

IV. ANALYSIS

A. Exhausting Administrative Remedies

Napa first argues that Schutt cannot raise any claims for discrimination or harassment based on sex or marital status, because she failed to exhaust her administrative remedies by failing to include these particular claims in her Equal Employment Opportunity Commission ("EEOC") and Department of Fair Employment and Housing ("DFEH") complaints. The court agrees.

To establish federal subject matter jurisdiction, Schutt was required to exhaust her EEOC administrative remedies before seeking federal adjudication of her claims. *See Sosa v. Hioraoka*, 920 F.2d 1451, 1456 (9th Cir.

1990). As the Ninth Circuit explained in *Sosa*, "[t]he jurisdiction scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation." *Id.* (citing *Green v. Los Angeles County Superintendent of Sch.*, 883 F.2d 1472, 1476 (9th Cir. 1989)). This court has subject matter jurisdiction over Schutt's allegations of discriminatory treatment based on sex and marital status if these claims either fall within the scope of the EEOC's *actual* investigation or an " 'EEOC investigation [of these charges] can reasonably be expected to grow out of the charge of discrimination,' " based on race. *Sosa*, 920 F.2d at 1456 (quoting *Kaplan v. International Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators*, 525 F.2d 1354, 1359 n.3 (9th Cir. 1975).

In Schutt's EEOC and DFEH complaint, the only marked box in the section "cause of discrimination based on – " was the box for 'race' and the box for 'other' wherein the word 'association' was written. There was no "x" in the boxes for 'sex' or 'marital status.' Thus, this court may only consider these new claims now listed in Schutt's federal complaint, if the new claims are "like or reasonably related to the allegations contained in the EEOC charge," so that the original EEOC investigation would have encompassed the additional charges. *Green*, 883 F.2d at 1475-76.

Besides neither box being checked in the EEOC complaint, there is also no reference to sex, gender, or marital status addressed in the body of the complaint. Schutt states in the complaint:

I believe that I have been discriminated against, harassed and terminated because of my association with a Black male employee. I am Caucasian. My belief is based on the following:

. . .

(B) During the next three months various team members learned that I was involved with a Black Officer in a personal relationship. Shortly, thereafter, team members began making racial epithets about Blacks and my association with a Black employee. Inmates harassed me about my personal relationship with a Black employee, when I complained to supervision, nothing was done to correct the harassment. The harassment created a hostile work environment.

(C) John Pearson a few weeks later informed me that my probation would be extended another six months because of my not having booking experience and because of a recent incident in the "dining room" which I believe was racial in nature, since another Black male employee and myself were verbally reprimanded even though a Senior Officer (Caucasian) was responsible for the problem.

(D) I believe that the reasons given for my termination are pretextual and that the only reason I was terminated is *because of my association with a Black male employee.*

EEOC Complaint, at 1-2. The court finds Schutt has failed to exhaust her administrative remedies with regard to her claims of discrimination and harassment based on sex and marital status. Given the complete absence of any

mention of discrimination based on any other factor other than association with a black man, the court fails to see how the EEOC investigation would have encompassed these additional charges. Any investigation would have focused on these charges of racial animosity due to an interracial relationship. *See Stallop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1051 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987) (finding complainant, who had only filed with DFEH a claim for national origin discrimination, could not then file claims for sex and age discrimination in her civil complaint, noting the DFEH "obviously . . . investigated only national origin discrimination, . . . [t]hus, [plaintiff] had not exhausted her administrative remedies.")[6]

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[6] The court also finds the allegations are sufficiently different in character from those addressed through the administrative procedures so as not to be reasonably related to the allegations in the EEOC complaint. The incidents of alleged sex discrimination through a hostile work environment are different incidents than those incidents of hostile work environment based on association with a black man. For example, one of Schutt's examples of hostile work environment based on sex mentions an incident where a fellow officer referred to her as a lesbian and stated he wished to tie her up with a fellow officer (not Perkins) and see what they did. This incident is entirely different than an incident where a fellow officer allegedly refused to or delayed in responding to a back-up call made by Schutt, because the officer is hostile about Schutt's interracial relationship. Accordingly, different incidents would be investigated by the EEOC, and the investigation would not be redundant. Yet, the EEOC was not afforded a chance to investigate these claims. Further, Napa had no notice of the federal basis for the claims of sex and marital status discrimination.

As further support, the court notes other courts have found no reasonable relation between claims even when the claims arose out of the same *type* of discrimination. *See Brown v. Puget*

Accordingly, this court lacks jurisdiction to hear any claims of discrimination or harassment based on sex or marital status, because Schutt failed to exhaust her administrative remedies.

B. Claims of Race Discrimination

Title VII renders it unlawful for an employer to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1); *St. Mary's Honor Center v. Hicks*, 125 L.Ed.2d 407, 420 (1993).

Schutt's complaint, liberally construed, alleges (1) discrimination arising out of her association with a black male employee through disparate treatment leading to termination and (2) creation of a hostile work environment.

Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 730 (9th Cir. 1984) (finding plaintiff's disparate treatment claim first raised in district court not reasonably related to EEOC complaint alleging only disparate impact in gender discrimination case); *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497 (7th Cir. 1994) (finding former employee's claim in complaint of sexual harassment could not reasonably have been inferred from allegations of sex discrimination in EEOC charge and was thus unexhausted); *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) (finding racial harassment claim barred in Title VII complaint because not mentioned in EEOC complaint; only EEOC charge was for failure to promote – "a different form of discrimination").

i. discrimination based on disparate treatment leading to termination

For Schutt's claim of discrimination through disparate treatment leading to termination, the court will use the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Galbrouth v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991) (applying analytical framework of *McDonnell* in interracial association case).

To prevail under a disparate treatment race discrimination claim, an employee must show that the employer harbored a discriminatory intent, but intent may be inferred from circumstantial evidence. *Jauregui v. City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988). Because it is often difficult to show direct evidence of discriminatory intent, the Supreme Court, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), enunciated a three-part analysis which allocates the burdens of proof "to achieve a fair determination of the 'elusive factual question of intentional discrimination.' " *Mixon*, 192 Cal. App. 3d at 1317 (citations omitted). The *McDonnell Douglas* test requires that (a) the complainant must establish a prima facie case of racial discrimination; (2) the employer must offer a legitimate reason for his actions; and then (3) the complainant must prove that this reason was a pretext to mask a racially discriminatory motive. Abundant case law has elaborated on each part of the analysis.

McDonnell Douglas set out the elements of a prima facie case of racial discrimination through disparate treatment. The complainant must show (1) that she belongs to a racial minority; (2) that she was qualified for the employment position; (3) that, despite her qualifications,

she was rejected; and (4) that, after her rejection, the position remained open and was ultimately filled by an individual of equal or lesser qualification. *McDonnell Douglas*, 411 U.S. at 802. Once a plaintiff has established a prima facie case, a presumption of discrimination arises. *Jauregui*, 852 F.2d at 1134.

Once plaintiff has established a prima facie case, the defendant must put forth a legitimate, nondiscriminatory reason for the employee's treatment. It is the responsibility of the defendant to "clearly set forth, through admissible evidence, the reason for the plaintiff's treatment. The explanation of the reasons for the refusal must be clear and reasonably specific." *University of Southern California v. Superior Court*, 222 Cal. App. 3d 1028, 1036 (1990) (citations omitted). If the defendant succeeds in offering a nondiscriminatory reason, the presumptions created by the prima facie case disappear and the plaintiff must prove the defendant's reasons are only a pretext for discrimination. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994).

A plaintiff can show pretext in two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Cotton v. City of Alameda*, 812 F.2d 1245, 1248 (9th Cir. 1987).

To withstand an employer's motion for summary judgment in a discrimination suit, "the employee must do more than establish a prima facie case and deny the credibility of the employer's witnesses. The plaintiff must also offer specific and significantly probative evidence

that the employer's alleged purpose is a pretext for discrimination." *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986).

Of course, a motion for summary judgment does not require a plaintiff to prove that the employer's reasons are pretextual. Rather, he need only "tender a genuine issue of material fact as to pretext in order to avoid summary judgment." *Cotton v. City of Alameda*, 812 F.2d 1245, 1248 (9th Cir. 1987). To do so, the plaintiff must offer specific facts showing that there remains a genuine factual issue for trial, and "evidence significantly probative as to any material fact claimed to be disputed." *Cotton*, 812 F.2d at 1249. "When evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case based on a *McDonnell Douglas* type presumption." *Chaffin v. Textron, Inc.*, 861 F. Supp. 972, 975 (E.D. Cal. 1994).

Ultimately, "as in any other summary judgment situation, the question can only be answered in each case by a review of the actual evidence offered by each party, to see whether a genuine issue of material fact has been presented for trial. If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate." *Wallis*, 26 F.3d at 889.

The court will thus apply this analysis with respect to Schutt's employment and termination of employment as a correctional officer.

For purposes of this motion, Schutt satisfies the first factor in the *McDonnell Douglas* test in that she represents a protected class. *See Chacon v. Ochs*, 780 F.Supp. 680 (C.D.Cal. 1991) (finding Title VII prohibited discrimination based on interracial association where a caucasian woman brought Title VII action for hostile work environment because she was married to a hispanic man).

The court finds Schutt minimally satisfies the second prong of the *McDonnell* analysis, qualification for employment. At the time of Schutt's termination, she had received the booking experience needed when her probation was extended another six-months.[7] She received a satisfactory evaluation, which, even though it was rejected by her supervisors, the court will accept as part of viewing the evidence in a light most favorable to Schutt.

Schutt satisfies the third *McDonnell* prong in that although Schutt was qualified, she was terminated. Regarding the fourth prong, the court realizes it is difficult to demonstrate the position remained open and/or was filled by someone of equal or lesser qualifications, given the make-up of corrections center. Extra-hires could have taken her place or the C Team could have covered

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[7] If Schutt wishes to consider the extension of her probation period as an adverse employment action, the court would have to find that she was not qualified at that time for permanent employment. She lacked the booking experience needed, and the alleged intimidation by inmates could also preclude Schutt from being qualified for permanent employment. The court instead is viewing the primary adverse employment action as the final release of Schutt from further employment in order to enable further analysis of her Title VII claim.

for her. However, despite this difficulty, the court finds, for purposes of this motion, Schutt adequately demonstrates the position was filled by a person of equal or lesser qualifications. Accordingly, Schutt minimally makes out a prima facie case of discrimination based on disparate treatment.

As a result, the burden now shifts to Napa to come forward with legitimate, non-discriminatory reasons for its action. The court finds Napa has satisfactorily responded with legitimate, non-discriminatory reasons for finally releasing her from employment.[8] Napa contends it discharged Schutt because she adamantly disobeyed a direct order of a supervisor by refusing to accept the position of Fire/Line/Safety officer. While plaintiff may have felt her reasons for refusing were legitimate (concern for son's health and desire to concentrate on already assigned responsibilities for purposes of passing probation), Napa also had produced a legitimate reason for discharging her – at least for purposes of Title VII analysis. Moreover, Napa contends she could not comply with the requisite hours needed for a part-time or full-time employee, because she still desired a modified

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[8] Although the court is not considering the extension of probation in Schutt's Title VII action (since she cannot establish she was qualified at the time of the extension to make a prima facie case), the court notes Napa has produced legitimate, non-discriminatory reasons for extending her probation. Napa contends her probation was extended because she lacked booking experience and the DOC felt she needed more training in inmate interaction due to concerns of intimidation. There is ample evidence that these were Napa's actual, legitimate reasons for extending her probation.

shift. Once again, the court finds these legitimate reasons for discharging Schutt for purposes of Title VII analysis.

As a result, the burden shifts back to Schutt to come forward with specific evidence as to why these legitimate reasons were pretextual and only served to mask underlying discriminatory intent. The court finds Schutt fails to do so. Schutt presents no specific evidence that Napa (as opposed to certain employees) exercised or condoned racial hostility or was otherwise motivated by racial animus. Schutt never informed Napa or anyone even in a supervisory position of most of the words or acts she found offensive. For example, the most egregious incident alleged by Schutt, someone leaving a bottle of black ink and a bottle of whiteout in her employee mailbox, was not reported to anyone in a supervisory capacity.

Further, when she did ask to be taken off the B Team, she did not emphasize it was because of harassment or discrimination. And, even if Schutt mentioned the racial tension to Pearson, Pearson responded through an investigation of the B Team. The investigation uncovered only one officer who felt racial tension existed, although she could not come forth with specific examples or incidents, save Officer Hamzey mentioning his disapproval of the relationship (*see infra*). The remainder of those interviewed had difficulty with Schutt because of non-race-related issues, such as her attitude and their lack of trust in her.

Lastly, there is no evidence that the failure to respond to back-up calls, informal reprimands by fellow officers, or other incidents that bothered Schutt were motivated by

race. In fact, Schutt's deposition is replete with admissions that Schutt did not believe many of these events were related to race.[9] While one officer, Hamzey, stated his disapproval of their relationship, because of both Perkins' status as a black man and married man, the court finds, without more, his beliefs cannot create an air of pretext by the upper management, especially when Schutt failed to tell Pearson directly of Hamzey's beliefs.

The court also finds that the break of confidentiality by Gonzales regarding Schutt's abortion does not support Schutt's claim of pretext. While it is a blatant breach of Schutt's privacy interest, it does not evidence racial animus by the upper management.

Schutt was transferred off the B Team, pursuant to her request, and experienced no further difficulties that were race-related on the C Team. The court emphasizes that it was while she was on the C Team that she was discharged.

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[9] As an example: from Schutt's deposition:

Q: Did Officer Gomez say anything or do anything that led you to believe that this informal reprimand was somehow related to your personal involvement with Officer Perkins?

A: No.

Q: Is it your belief that she made this informal reprimand because of your personal relationship with Officer Perkins?

A: I'm not sure why she did it.

Q: Did you ever form the impression that this incident or what you perceived as her change in behavior had anything to do with your relationship with Officer Perkins?

A: No.

Accordingly, viewing the record in the light most favorable to Schutt, the court cannot find any evidence that interracial associations motivated her final release. While the record may reflect some hostility felt by certain employees and supervisors towards Schutt, which may have impacted their decision to extend her probation or discharge her, there is no evidence that this hostility was racially motivated. Schutt and Luis' depositions evidence a belief that the upper management was on a "powertrip," but without more, however, the court cannot accept this evidence as being racially motivated.

In the absence of any specific evidence that (1) Napa was motivated by race in its decision to extend her probation or discharge her, and (2) the credibility of Napa is unworthy of credence, Schutt's claims of pretext cannot withstand summary judgment.

Accordingly, summary judgment with regard to Schutt's claims of discrimination through disparate treatment resulting in extension of probation and ultimate discharge is granted in favor of Napa.

ii. hostile work environment

To be cognizable under Title VII, racial harassment must be sufficiently severe or pervasive to alter the terms, conditions, or privileges of the plaintiff's employment. *Mentor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (racial harassment actionable under Title VII). The court must look to the "totality of the circumstances" to see if a

hostile work environment exists. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

Looking at all the evidence, the court does not find an actionable claim for creation of a hostile work environment exists.[10] The racial joke made by Dave Davidson, a fellow officer, occurred only once and did not relate to interracial relationships.[11] While the court agrees such comments are utterly offensive, as Justice O'Connor stated in *Harris*, the "mere utterance of an . . . epithet, which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." 114 S.Ct. at 370 (internal quotations and citations omitted). While the court is bothered by the mailbox incident involving black and white ink bottles, the court does not find such an incident, in the absence of other racially offensive conduct, rises to the level of pervasiveness as to alter the terms, conditions, or privileges of her employment.

Neither Schutt nor Luis (the other officer who felt racial tension) can turn to specific incidences or references of racially offensive behavior. While they state they felt racial tension existed because of the relationship, they present no specific evidence. Luis does mention in her deposition that Hamzey explicitly commented that he did

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[10] The court notes it is only looking at the evidence relating to a hostile work environment based on race. Evidence of sexually derogatory comments will not be considered for reasons set forth in Part IVA of this order.

[11] The joke was as follows:

"Hey, do you know when I hunt, I only shoot at cans – Mexicans, Puerto Ricans, and Africans."

not approve of Schutt's relationship with a black man. There is no evidence, however, that Napa knew or should have known about Hamzey's beliefs. Schutt never mentioned to Pearson that Hamzey disapproved of her relationship with Perkins. Further, it appears the only negative or joking comments specifically made to Schutt by coworkers (not inmates) about her relationship with Perkins related to the fact that she was seeing a "married" man, not a black man, as demonstrated by use of the word "homewrecker."

Even if the court were to hold a hostile environment existed, the critical issue is whether or not Napa knew or, in the exercise of reasonable care, should have known about the harassment and hostile work environment, so that they could be held liable for failing to remedy or prevent these hostile acts. *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1515-1516 (9th Cir. 1989). As noted, Schutt did not inform her supervisors or Napa about most of the hostile acts. And, given the discrete nature of the acts and the difficulty of even correlating these acts to her relationship with Perkins, the court fails to see how Napa knew or could have reasonably known about such an environment. Further, even if Schutt did characterize her problems with the B Team as racial in nature (which it is unclear from her deposition that she did), or Pearson was otherwise aware of the racial tension, Pearson responded through investigation and transfer to another team.

The court fails to see how Napa condoned or failed to remedy the hostile work environment were the court to find one existed so as to be held liable under Title VII. While Schutt alleges the racial tension spread to the

upper management even when she was on the C Team, the court finds no evidence of the upper management exhibiting, condoning, or failing to remedy racial tension. The court notes the only difficulties with the C Team, that are supported with evidence, are (1) the sexual comments made by Cravea, which the court will not consider, and (2) the problems with Rose and Cunningham regarding Schutt's evaluations, modifying her shift, and her refusal of the Fire/Line/Safety assignment, which the court does not find motivated by race or the result of a hostile work environment.

Accordingly, Napa's motion for summary judgment as to Schutt's claim of a hostile work environment based on race is granted.

C. Retaliation Claim

Napa argues in its papers that Schutt pleads for the first time in her opposition papers a claim for retaliation in violation of Title VII, and that absent listing retaliation as a cause of action in her complaint, the claim must be rejected. The court finds it is not necessary to address this procedural issue, because the claim fails on the merits.

To make out a prima facie case, Schutt must establish that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between these two events. *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988). Schutt fails to establish that she acted to protect her Title VII rights and was retaliated against for such action.

Her argument that she was retaliated against for her complaint of the B Team is insufficient to demonstrate retaliation. Schutt fails to identify what the "complaint" actually was, how specific it was, or what the "treatment" was on the B Team about which she was complained. In fact, it is unclear she ever specified to Pearson the nature of the harassment. While Schutt may demonstrate adverse employment action, for purposes of a cause of action for retaliation, Schutt must also demonstrate she acted to protect her Title VII rights, and that there was a causal connection between the two, which she fails to do. Accordingly, summary judgment in favor of Napa on Schutt's claim for retaliation is granted.

D. Breach of Contract Claim

Napa moves for summary judgment on Schutt's claim of breach of contract and breach of the covenant of good faith and fair dealing. The employment contract, according to the complaint, consisted of the Napa County Department of Corrections Policy Manual and the Memorandum of Understanding.

The court finds because Schutt was a public employee, she cannot state a claim for relief for breach of contract. *See Cox v. County of San Diego*, 233 Cal.App.3d 300, 312 n.7 (1991) (finding causes of action for breach of contract or for breach of implied covenant of good faith and fair dealing are not viable against the North County Judicial District because it has been established that public employees hold positions by statute and not by contract) (citing *Miller v. State of California*, 18 Cal.3d 808, 813 (1977)). Absent any opposition from Schutt regarding this

claim, and the absence of any authority to the contrary, the court grants Napa's motion for summary judgment as it relates to Schutt's claims for breach of contract and breach of implied covenant of good faith and fair dealing. *See* Fed.R.Civ.P. 56(e).

V. CONCLUSION

For the foregoing reasons, the court orders that

(1) defendant the County of Napa's motion for summary judgment as to all of plaintiff Violet Schutt's claims is GRANTED.

(2) plaintiff Violet Schutt's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: August 15, 1995

/s/ Samuel Conti
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIOLET M. SCHUTT, Plaintiff, vs. COUNTY OF NAPA, Defendant.	)	No. C-94 2115 SC JUDGMENT (Filed Aug. 15, 1995)

ENTERED IN CIVIL DOCKET 8/15, 1995

It is hereby ORDERED, ADJUDGED, and DECREED that defendant the County of Napa's motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED in accordance with the order entered by the court herein.

DATED: August 15, 1995

/s/ Samuel Conti
United States District Judge

42 USC § 2000e-2

Civil Rights Equal Employment Opportunities

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

EEOC | NOTICE | Number 915.002

Date 4/12/94

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1. SUBJECT: Enforcement Guidance on *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 61 EPD ¶ 42,322 (1993).

2. PURPOSE: This document discusses the decision in *Hicks* and its effect on the Commission's investigations of charges alleging disparate treatment.

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superceded.

5. ORIGINATOR: Title VII/EPA Division, Office of Legal Counsel.

6. INSTRUCTIONS: File after Section 604 of Volume II of the Compliance Manual, Theories of Discrimination.

7. SUBJECT MATTER:

In *St. Mary's Honor Center v. Hicks*, ___U.S.___, 113 S.Ct. 2742, 61 EPD ¶ 42,322 (1993), the question presented to the Supreme Court was whether, in a disparate treatment case involving circumstantial evidence, the fact finder must find in favor of the complainant if it determines that

the employer's[1] asserted reasons for its actions are not credible.[2] The Court held that the fact finder is not required, as a matter of law, to find discrimination whenever it finds that the employer's explanation for its action is not credible. However, the Court also made clear that a fact finder may find discrimination in such circumstances. The critical factor is that the fact finder must be persuaded that it was discrimination that motivated the employer to act as it did.

This enforcement guidance analyzes the *Hicks* decision and explains the impact of that decision on EEOC charge processing.

Background

Melvin Hicks, a black male, worked as a shift commander for St. Mary's Honor Center, a halfway house. In January 1984, new supervisors were placed at St. Mary's. Up until this time, Hicks had received satisfactory performance reviews; however, beginning in March 1984, Hicks

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[1] The term "employer" has been used throughout this document for ease of reference and is intended to apply to other covered respondents.

[2] Although the Court's decision in "Hicks" involved a claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, (1991), the principles applied by the Court are equally applicable to disparate treatment charges involving circumstantial evidence brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, as amended (1990), the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (1990), and the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.* (1992). *See also* note 4, *infra*, and accompanying text.

was subjected to repeated and increasingly severe disciplinary actions. He was suspended five days for violations of rules by his subordinates; he received a letter of reprimand for failure to adequately investigate a brawl between inmates that occurred on his shift; and he was demoted for actions of his subordinates related to the use of an official vehicle. Hicks was ultimately discharged in June 1984 for threatening his supervisor during an argument in April 1984.

Hicks filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under § 1983 of the Civil Rights Act of 1866, 42 U.S.C. § 1983. The district court applied the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 EPD ¶ 8607 (1973), and concluded that Hicks established a prima facie case of race discrimination: he is black; he was qualified for the position of shift commander; he was subjected to adverse employment actions; and the position remained open and was ultimately filled by a white man. The district court found that St. Mary's met its burden of production by articulating two legitimate, nondiscriminatory reasons for its actions: the severity and the accumulation of the rules violations. However, the district court also found that St. Mary's articulated reasons were false. Hicks was the only supervisor disciplined for violations committed by subordinates; similar and more serious violations committed by coworkers were either disregarded or treated more leniently; and the superior officer with whom Hicks argued manufactured the final confrontation to provoke Hicks into threatening him. Nonetheless, the district court decided that Hicks failed to show that the adverse employment actions were

racially rather than personally motivated. The factors used to support the court's conclusion included the facts that two blacks sat on the board that recommended that Hicks be disciplined, Hicks' black subordinates who actually committed the violations were not disciplined, and the percentage of blacks in the workforce at St. Mary's remained constant.

The Eighth Circuit reversed and remanded. The circuit court held that once a plaintiff shows that the employer's articulated reasons for the adverse employment actions are not credible, the plaintiff is entitled to judgment as a matter of law. The court reasoned that because all of St. Mary's proffered reasons were discredited, it was in no better position than if it had remained silent and thus had offered no rebuttal to the inference raised by Hicks' prima facie case that St. Mary's had discriminated against him because of his race. The Supreme Court granted *certiorari* to resolve the issue.

The Opinion

The Supreme Court held that a showing that the employer's reasons are not credible did not mandate a finding for the plaintiff. The Court examined the framework established in *McDonnell Douglas Corp. v. Green, supra,* regarding the allocation of the burden of production and the order of presentation of proof. The Court reiterated that the plaintiff must first establish a prima facie case, which raises a presumption that the employer discriminated against the employee, and that the burden of production then shifts to the employer to articulate a legitimate nondiscriminatory explanation for its actions.

The Court stressed, however, that the burden of proof remains at all times with the plaintiff. Once the employer meets its burden of production, the presumption raised by the prima facie case drops from the case and the *McDonnell Douglas* framework is no longer relevant. *Hicks*, 113 S.Ct. at 2747, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 25 EPD ¶ 31,544 (1981). The employee must then persuade the trier of fact that discrimination was the reason for the employer's actions. *Hicks*, 113 S. Ct. at 2749, 61 EPD at 75,583 and 75,584.

The Supreme Court expressly rejected the Eighth Circuit's reasoning that if the employer's reasons are found not to be credible it is in no better position than if it had remained silent. Instead, the Court stated that a defendant is in a better position if it has presented evidence of nondiscriminatory reasons, whether that evidence is ultimately persuasive or not. The Court said that to meet its burden of production, the employer need only produce evidence and that it is irrelevant at this stage whether that evidence is persuasive. The Court reasoned that a plaintiff would be entitled to judgment as a matter of law only upon a finding that s/he established a prima facie case by a preponderance of the evidence and that the defendant failed to produce evidence of nondiscriminatory reasons for its actions. Where an employer produces such evidence, the trier of fact must decide the ultimate question of whether the plaintiff has proven that the employer intentionally discriminated against him or her.

The Court noted that the fact finder's disbelief of the articulated reasons, coupled with the elements of the

prima facie case, may suffice to show intentional discrimination. Thus, a fact finder may infer discrimination when it rejects the defendant's articulated reasons. Further, the Court agreed with the Eighth Circuit's conclusion that no other proof is required when the fact finder rejects the defendant's reasons.[3] However, the Court rejected the Court of Appeals' holding that, as a matter of law, disbelief of the defendant's reasons *compels* judgment for the plaintiff. *Hicks*, 113 S. Ct. at 2749 (emphasis in the original).

The Court ruled that an employer cannot be held liable unless the fact finder determines that the employer has unlawfully discriminated. A finding that the employer's explanation of its action is not believable cannot be substituted for the required finding that an employer unlawfully discriminated. It is not sufficient, the Court stated, "to *dis*believe the employer; the fact

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[3] In other words, *Hicks* rejected the "pretext plus" rule imposed by some courts. *See, e.g., Galbraith v. Northern Telecom*, 944 F.2d 275, 57 EPD ¶ 40,956 (6th Cir. 1991); *Mesnick v. General Electric*, 950 F.2d 816, 57 EPD ¶ 41,143 (1st Cir. 1991). Under the pretext-plus rule, the plaintiffs must not only prove that the employer's explanation is false, but must also produce some additional affirmative evidence of intentional discrimination. Under *Hicks*, the trier of fact may conclude that a prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination. *Hicks*, 113 S. Ct. at 2749. *See also Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 63 EPD ¶ 42,759, 63 FEP Cases 1016 (7th Cir. 1994) (Supreme Court rejected "pretext plus" rule in *Hicks* and instead adopted a rule under which a fact finder is permitted to infer discrimination from the disbelief of the employer's reasons and the elements of the prima facie case).

finder must *believe* the plaintiff's explanation of intentional discrimination." *Hicks*, 113 S. Ct. at 2754 (emphasis in the original).

The Court reversed and remanded to the Eighth Circuit. The Eighth Circuit has remanded to the district court for consideration of the Supreme Court's decision.[4]

Discussion

Hicks applies only to disparate treatment cases that involve circumstantial evidence. The *McDonnell Douglas/ Hicks* framework for drawing an inference of discrimination is not relevant when discrimination can be proved directly. Thus, the *Hicks* decision does not affect Commission processing of charges where the allegations can be proven solely by direct evidence. [5] Moreover, since *Hicks* involves a determination of discriminatory intent (or motive), it is inapplicable to disparate impact cases.

As a practical matter, *Hicks* also should not significantly affect the Commission's processing of charges that

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[4] 2 F.3d 264, 62 FEP Cases 955 (8th Cir. 1993).

[5] Investigators should consult the Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992) for further guidance on processing direct evidence charges. As that Guidance notes, investigators should typically analyze cases involving both direct and circumstantial evidence under the traditional *McDonnell Douglas* framework. The *McDonnell Douglas* framework should also be applied to cases involving direct evidence where there is direct evidence of bias, but no evidence connecting the bias to the adverse action, and in cases where the reliability of the direct evidence is at issue. *See id.*, pp. 8-10.

involve circumstantial evidence of intentional discrimination.[6] *Hicks* merely clarifies the relative burdens in disparate treatment claims in which there is a question about the validity of the employer's justification for its adverse treatment of the complainant. Burdens of proof and production are not usually critical to EEOC charge processing since investigators seek out *all* relevant evidence and then determine whether there is reasonable cause to believe that discrimination occurred.[7]

Thus, investigators should continue to thoroughly explore *all* of an employer's asserted justifications for its actions and other aspects of the workplace that may show pretext (or lack thereof). However, even if the investigator concludes, in a particular case, that the employer's justification was not credible and was an attempt to cover up discrimination, some courts may view the case differently. Therefore, other evidence of bias in the workplace should be developed.

> Example – CP, a 58 year old man, files a charge in which he alleges he was fired from his job because of his age. The investigator concludes that CP was qualified for his job, performed

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[6] The *Hicks* decision may affect certain litigation. While *Hicks* does not, as a matter of law, require a plaintiff to produce additional evidence of intent to discriminate where the employer's explanation for its actions is found not to be credible, it does, as a practical matter, permit a fact finder to require such affirmative evidence. This is contrary to the Commission's position, prior to *Hicks*, that where the employer's explanation is not credible, it must be presumed to be a cover-up – or pretext – for discrimination.

[7] *See* Compliance Manual, Vol. II, § 604.6, Final Analysis of all the Evidence.

satisfactorily, was discharged, and was replaced by a much younger person with similar skills and qualifications. R asserts that CP was fired because 1) he had entered into a business with his daughter that involved substantial risk that he would disclose company secrets even though CP had been required to sign a confidentiality agreement; 2) CP's loyalty to R was questionable; and 3) R had a continuing dispute with CP over his pay. The investigation discloses that CP had entered into a business with his daughter but that it had no relationship to R's business, and thus, involved little, if any, risk that CP would disclose R's company secrets. It also revealed that the pay dispute had been resolved over a year ago and that, since that time, CP's work had been rated excellent. Indeed, CP frequently worked weekends when asked to do so to complete projects important to R. Thus, the investigator concludes that R's explanation is not credible. The investigator also discovers that younger employees in CP's department were not asked to sign confidentiality agreements. The investigator recommends a cause finding based on the employer's misrepresentations and the additional evidence of pretext for discrimination.

In most cases, before and after *Hicks*, if the evidence shows that the respondent's articulated reasons are untrue, it can be assumed that the employer is trying to cover up discrimination, and, hence, that a finding of "cause" is appropriate. Although *Hicks* clearly holds that a showing that an employer's articulated reason is untrue

does not compel a finding a liability, it is also clear that such a finding is permitted.[8]

> Example – CP, an African-American male with four years of experience in pop music broadcasting, applies for a job as a disc jockey at a radio station that features pop music. CP files a charge of race discrimination with the EEOC after the radio station rejects him in favor of a white female d.j. The radio station defends its decision to hire the white female d.j. over CP by asserting that CP did not have as much experience as the white d.j. CP provides evidence that the white female d.j.'s only experience was with a radio station that played only jazz; and that the station traditionally hires d.j.'s based on their experience in pop music broadcasting. The investigator concludes that the radio station's given reason is untrue and finds no evidence of any other legitimate, nondiscriminatory reason for its rejection of CP. Here, there is sufficient evidence that R intentionally discriminated against CP and, thus, a "cause" finding should be issued.[9]

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[8] *See Pilditch v. Bd. of Educ. of City of Chicago*, 3 F.3d 1113, 1116, 62 EPD ¶ 42,518 at 76,741 (7th Cir. 1993) (a showing that the employer's asserted justification is untrue may support an inference that R's real reason for its action is discrimination); *Washington v. Garrett*, 10 F.3d 1421, 63 FEP Cases 540 (9th Cir. 1993) (the fact finder may infer discrimination where it is shown that the employer's asserted reasons for laying off the plaintiff are not credible; here, the court found that the employer was not suffering from any financial hardship at the time of the layoff, two new employees were hired into the office after the plaintiff was laid off, and productivity of the office did not improve).

[9] *Compare Mojica v. Gannett Co., Inc.*, 7 F.3d 552, 62 EPD ¶ 42,577, 62 FEP Cases 1561 (7th Cir. 1993) (*en banc*) (facts of

Even before *Hicks*, if evidence relevant to a charge clearly showed that the respondent's articulated reasons for its action were untrue, but that a nondiscriminatory reason not articulated by the respondent was the true motive for the action, "no cause" would be found. This is because, as *Hicks* emphasizes, the question is always whether the employer's asserted justification is a pretext for discrimination. If it is a cover-up for something other than discrimination, the federal anti-discrimination statutes are not violated. Therefore, where an investigator uncovers evidence of a nondiscriminatory motive, even when the respondent has not offered it, the investigator should consider this evidence in light of all the evidence, and, if appropriate, reach a "no cause" determination.

> Example – CP, a Hispanic female, applies for a chemist's position with Applied Sciences, Inc. CP is rejected in favor of a while female. During the investigation, R justifies its failure to hire CP on the grounds that she was not as well qualified as the selectee in terms of her experience and education. CP offers evidence that she had three years more experience and post-graduate work, although the position required only one year experience and a B.S. degree. CP also informs the investigator that the selectee is the hiring official's best friend Betty, that the hiring official had promised Betty a job with him throughout Betty's schooling, but that hiring official did not want to admit that he hired his best friend because it would not "look right."

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example are derived from this case in which the Seventh Circuit found that there was sufficient evidence of discrimination by radio station against Hispanic female disc jockey).

An analysis of Applied Sciences' workforce also shows that it has several Hispanic chemists in its employ. In this case, the investigator should recommend a "no cause" determination, because, although the respondent's proffered reasons are not true, there is affirmative evidence that the employer was motivated by favoritism rather than by national origin discrimination.

Charge Processing

In analyzing disparate treatment cases involving circumstantial evidence, the fact finder should consider all relevant evidence. In most cases, if there is evidence that the employer's articulated reasons are not credible, and the complainant is able to establish a prima facie case, a finding of discrimination is merited. In determining whether the employer has discriminated, the fact finder should also consider whether there is any evidence of a legitimate, nondiscriminatory reason that the employer has not articulated and the explanation offered by the employer for its failure to assert this legitimate reason. Where the employer's reasons are not credible, a "cause" finding is appropriate.

Investigators should consider the following in processing charges involving circumstantial evidence of disparate treatment[10]:

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[10] For further guidance, *see* Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992).

- Has the respondent articulated nondiscriminatory reasons for its actions? If so, what are those reasons?

- Is there evidence that the respondent's articulated reasons are untrue? What is this evidence? Does CP have any evidence to rebut the respondent's explanation? What is this evidence? Is it credible? If the investigator finds that CP's evidence rebutting the respondent's asserted explanation is more credible, a "cause" finding is appropriate. If CP is unable to rebut the respondent's evidence, but can establish a prima facie case, and the investigator determines that the respondent's asserted reasons are not credible, a "cause" finding should be issued.

- Is there evidence that the respondent's actions were motivated by intentional discrimination? What is this evidence? For example, investigators should look at employees who are similarly situated to CP to determine if they are treated equally. Evidence of discriminatory activities in the workplace should also be examined.

- Is there evidence that the respondent's actions were taken for another reason that is not discriminatory? What is this evidence? Is this evidence credible? What explanation does the respondent offer for failing to assert this legitimate reason? If the investigator determines that the respondent acted for a legitimate, nondiscriminatory reason, even though the respondent did not offer this reason, and CP is unable to rebut this evidence, a "no cause" finding is appropriate. However, investigators should carefully consider the evidence of this reason and the respondent's justification

for not offering a legitimate explanation in determining credibility.

4/12/94
Date

Approved: /s/ Tony E. Gallegos
Tony E. Gallegos
Chairman

103D CONGRESS
1ST SESSION **H. R. 2787**

To amend title VII of the Civil Rights Act of 1964 to specify certain evidentiary matters relating to establishing an unlawful employment practice based on disparate treatment.

IN THE HOUSE OF REPRESENTATIVES

JULY 28, 1993

Mr. MANN introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend title VII of the Civil Rights Act of 1964 to specify certain evidentiary matters relating to establishing an unlawful employment practice based on disparate treatment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employment Discrimination Evidentiary Amendment of 1993".

SEC. 2. AMENDMENT.

Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following:

"(l)(1) An unlawful employment practice based on disparate treatment is established if –

"(A) the complaining party proves by a preponderance of the evidence a prima facie case that the respondent engaged in such practice; and

"(B) either –

"(i) the respondent fails to produce any evidence to rebut such case; or

"(ii)(I) the respondent articulates, and produces evidence of, one or more legitimate, nondiscriminatory reasons for the conduct alleged to be the unlawful employment practice; and

"(II) the complaining party demonstrates that each of such reasons is not true, but a pretext for discrimination that is the unlawful employment practice.

"(2) Paragraph (1) shall not be construed to specify the only mean by which an unlawful employment practice based on disparate treatment may be established.".

103D CONGRESS
1ST SESSION **H. R. 2867**

To amend title VII of the Civil Rights Act of 1964 with respect to establishing an unlawful employment practice based on disparate treatment.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 1993

Mr. HASTINGS introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend title VII of the Civil Rights Act of 1964 with respect to establishing an unlawful employment practice based on disparate treatment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Disparate Treatment Employment Discrimination Amendment of 1993".

SEC. 2. AMENDMENT.

Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following:

"(l)(1) An unlawful employment practice based on disparate treatment is established if –

"(A) the complaining party, by a preponderance of the evidence, proves a prima facie case that the respondent engaged in conduct that constitutes unlawful disparate treatment based on race, color, religion, sex, or national origin; and

"(B) either –

"(i) the respondent fails to produce any evidence to rebut such case; or

"(ii)(I) the respondent clearly articulates, and produces evidence of, one or more legitimate, nondiscriminatory reasons for the conduct alleged to be the unlawful disparate treatment; and

"(II) the complaining party demonstrates that each of such reasons is not true, but a pretext for discrimination that is the unlawful disparate practice.

"(2) Paragraph (1) shall not be construed to specify the only method by which an unlawful employment practice based on disparate treatment may be established.".

103D CONGRESS
1ST SESSION

S. 1776

To amend the Revised Statutes to restore standards for proving intentional discrimination.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 22, 1993

Mr. METZENBAUM (for himself, Mr. FEINGOLD, Mr. WOFFORD, Mrs. MURRAY, and Mr. SIMON) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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A BILL

To amend the Revised Statutes to restore standards for proving intentional discrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Standards Restoration Act".

SEC. 2. FINDINGS.

Congress finds that –

(1) the Supreme Court enunciated a method of proving intentional discrimination under Federal law in McDonnell Douglas Corp.

v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981);

(2) such method has been applied to establish intentional discrimination in cases and proceedings under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), and other Federal laws; and

(3) the standards established in St. Mary's Honor Center v. Hicks, No. 92-602 (1993), regarding the effect of a finding of pretext on proof of unlawful intentional discrimination, are contrary to –

(A) such method established by the Supreme Court in McDonnell Douglas Corp. v. Green and Texas Department of Community Affairs v. Burdine; and

(B) congressional intent regarding such Federal laws.

SEC. 3. PURPOSES.

The purposes of this Act are –

(1) to restore the standards (regarding the effect of a finding of pretext on proof of unlawful intentional discrimination) enunciated by the Supreme Court in McDonnell Douglas Corp. v. Green and Texas Department of Community Affairs v. Burdine as part of a method of proving intentional discrimination; and

(2) to ensure the application of such restored standards in all cases and proceedings under Federal law (including title VII of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968, the Age Discrimination in Employment Act of 1967, and other Federal laws) to which such method applies.

SEC. 4. STANDARDS FOR PROVING INTENTIONAL DISCRIMINATION IN CERTAIN CIRCUMSTANCES.

The Revised Statutes are amended by inserting after section 1979 (42 U.S.C. 1983) the following new section:

"SEC. 1979A. STANDARDS FOR PROVING INTENTIONAL DISCRIMINATION IN CERTAIN CIRCUMSTANCES.

"(a) STANDARDS. – In a case or proceeding brought under Federal law in which a complaining party meets its burden of proving a prima facie case of unlawful intentional discrimination and the respondent meets its burden of clearly and specifically articulating a legitimate, non-discriminatory explanation for the conduct at issue through the introduction of admissible evidence, unlawful intentional discrimination shall be established where the complaining party persuades a trier of fact, by a preponderance of the evidence, that –

"(1) a discriminatory reason more likely motivated the respondent; or

"(2) the respondent's proffered explanation is unworthy of credence.

"(b) RULE OF CONSTRUCTION. – This section shall apply only to those cases and proceedings in which the method of proof articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), applies and shall not be construed to specify the exclusive means by which the complaining party may establish unlawful intentional discrimination under Federal law.".

103D CONGRESS
1ST SESSION **H. R. 3680**

To amend the Revised Statutes to restore standards for proving intentional discrimination.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 22, 1993

Mr. OWENS (for himself and Mr. HASTINGS) introduced the following bill; which was referred jointly to the Committees on Education and Labor and the Judiciary

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A BILL

To amend the Revised Statutes to restore standards for proving intentional discrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Standards Restoration Act".

SEC. 2. FINDINGS.

Congress finds that –

(1) the Supreme Court enunciated a method of proving intentional discrimination under Federal law in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981);

(2) such method has been applied to establish intentional discrimination in cases and proceedings under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), and other Federal laws; and

(3) the standards established in St. Mary's Honor Center v. Hicks, No. 92-602 (1993), regarding the effect of a finding of pretext on proof of unlawful intentional discrimination, are contrary to –

(A) such method established by the Supreme Court in McDonnell Douglas Corp. v. Green and Texas Department of Community Affairs v. Burdine; and

(B) congressional intent regarding such Federal laws.

SEC. 3. PURPOSES.

The purposes of this Act are –

(1) to restore the standards (regarding the effect of a finding of pretext on proof of unlawful intentional discrimination) enunciated by the Supreme Court in McDonnell Douglas Corp. v. Green and Texas Department of Community Affairs v. Burdine as part of a method of proving intentional discrimination; and

(2) to ensure the application of such restored standards in all cases and proceedings under Federal law (including title VII of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968, the Age Discrimination in

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"(1) a discriminatory reason more likely motivated the respondent; or

"(2) the respondent's proffered explanation is unworthy of credence.

"(b) RULE OF CONSTRUCTION. – This section shall apply only to those cases and proceedings in which the method of proof articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981),

applies and shall not be construed to specify the exclusive means by which the complaining party may establish unlawful intentional discrimination under Federal law.".

209

[LOGO] **Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment.**

Official Title and Summary Prepared by the Attorney General

PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES. INITIATIVE CONSTITUTIONAL AMENDMENT.

- Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.
- Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.
- Mandates enforcement to extent permitted by federal law.
- Requires uniform remedies for violations. Provides for severability of provisions if invalid.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- The measure could affect state and local programs that currently cost well in excess of $125 million annually.
- Actual savings to the state and local governments would depend on various factors (such as future court

decisions and implementation actions by government entities).

Analysis by the Legislative Analyst

BACKGROUND

The federal, state, and local governments run many programs intended to increase opportunities for various groups – including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. For example, state law identifies specific goals for the participation of women-owned and minority-owned companies on work involved with state contracts. State departments are expected, but not required, to meet these goals, which include that at least 15 percent of the value of contract work should be done by minority-owned companies and at least 5 percent should be done by women-owned companies. The law requires departments, however, to reject bids from companies that have not made sufficient "good faith efforts" to meet these goals.

Other examples of affirmative action programs include:

- Public college and university programs such as scholarship, tutoring, and outreach that are targeted toward minority or women students.
- Goals and timetables to encourage the hiring of members of "underrepresented" groups for state government jobs.
- State and local programs required by the federal government as a condition of receiving

federal funds (such as requirements for minority-owned business participation in state highway construction projects funded in part with federal money).

PROPOSAL

This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve "preferential treatment" based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires the continuation of certain programs.

The measure provides exceptions to the ban on preferential treatment when necessary for any of the following reasons:

- To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

FISCAL EFFECT

If this measure is approved by the voters, it could affect a variety of state and local programs. These are discussed in more detail below.

Public Employment and Contracting

The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. Contracts affected by the measure would include contracts for construction projects, purchases of computer equipment, and the hiring of consultants. These prohibitions would not apply to those government agencies that receive money under federal programs that require such affirmative action.

The elimination of these programs would result in savings to the state and local governments. These savings would occur for two reasons. First, government agencies no longer would incur costs to administer the programs. Second, the prices paid on some government contracts would decrease. This would happen because bidders on contracts no longer would need to show "good faith efforts" to use minority-owned or women-owned subcontractors. Thus, state and local governments would save money to the extent they otherwise would have rejected a low bidder – because the bidder did not make a

"good faith effort" – and awarded the contract to a higher bidder.

Based on available information, we estimate that the measure would result in savings in employment and contracting programs that could total tens of millions of dollars each year.

Public Schools and Community Colleges

The measure also could affect funding for public schools (kindergarten through grade 12) and community college programs. For instance, the measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. (It would not, however, affect *court-ordered* desegregation programs.) Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools) and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities. We estimate that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected by the measure.

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin.

Funds spent on these programs total at least $15 million each year.

Thus, the measure could affect up to $75 million in state spending in public schools and community colleges.

The State Constitution requires the state to spend a certain amount each year on public schools and community colleges. As a result, under most situations, the Constitution would require that funds that cannot be spent on programs because of this measure instead would have to be spent for *other* public school and community college programs.

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University (CSU) uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. In 1995, the Regents of the University of California (UC) changed the UC's admissions policies, effective for the 1997-98 academic year, to eliminate all consideration of race or ethnicity. Passage of this initiative by the voters might require the UC to implement its new admissions policies somewhat sooner.

Both university systems also run a variety of assistance programs for students, faculty, and staff that are targeted to individuals based on sex, race, or ethnicity. These include programs such as outreach, counseling, tutoring, and financial aid. The two systems spend over

$50 million each year on programs that probably would be affected by passage of this measure.

Summary

As described above, this measure could affect state and local programs that currently cost well in excess of $125 million annually. The actual amount of this spending that might be saved as a result of this measure could be considerably less, for various reasons:

- The amount of spending affected by this measure could be less depending on (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires continuation of certain programs.

- In most cases, any funds that could not be spent for existing programs in public schools and community colleges would have to be spent on other programs in the schools and colleges.

- In addition, the amount affected as a result of *this* measure would be less if any existing affirmative action programs were declared unconstitutional under the United States Constitution. For example, five state affirmative action programs are currently the subject of a lawsuit. If any of these programs are found to be unlawful, then the state could no longer spend money on them – regardless of whether this measure is in effect.

- Finally, some programs we have identified as being affected might be changed to use factors other than those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could be changed to target instead high schools with low percentages of UC or CSU applications.

209 Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment.

Argument in Favor of Proposition 209

THE RIGHT THING TO DO!

A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.

Proposition 209 is called the California Civil Rights Initiative because it restates the historic Civil Rights Act and proclaims simply and clearly: "The state shall not discriminate against, or grant preferential treatment to, any individual or group, on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."

"REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG!

And two wrongs don't make a right! Today, students are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE.

That's just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination!

And, remember, Proposition 209 keeps in place all federal and state protections against discrimination!

BRING US TOGETHER!

Government cannot work against discrimination if government itself discriminates. Proposition 209 will stop the terrible programs which are dividing our people and tearing us apart. People naturally feel resentment when the less qualified are preferred. We are all Americans. It's time to bring us together under a single standard of equal treatment under the law.

STOP THE GIVEAWAYS!

Discrimination is costly in other ways. Government agencies throughout California spend millions of your tax dollars for costly bureaucracies to administer racial and gender discrimination that masquerade as "affirmative action." They waste much more of your money awarding high-bid contracts and sweetheart deals based not on the low bid, but on unfair set-asides and preferences. This money could be used for police and fire protection, better education and other programs – for everyone.

THE BETTER CHOICE: HELP ONLY THOSE WHO NEED HELP!

We are individuals! Not every white person is advantaged. And not every "minority" is disadvantaged. Real "affirmative action" originally meant no discrimination and sought to provide opportunity. That's why Proposition 209 prohibits discrimination and preferences and allows any program that does not discriminate, or prefer, because of race or sex, to continue.

The only honest and effective way to address inequality of opportunity is by making sure that *all* California children are provided with the tools to compete in our society. And then let them succeed on a fair, color-blind, race-blind, gender-blind basis.

Let's not perpetuate the myth that "minorities" and women cannot compete without special preferences. Let's instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and *zero tolerance for discrimination against – or for – any individual.*

Vote for FAIRNESS . . . not favoritism!

Reject preferences by voting YES on Proposition 209.

PETE WILSON
Governor, State of California

WARD CONNERLY
Chairman, California Civil Rights Initiative

PAMELA A. LEWIS
Co-Chair, California Civil Rights Initiative

Rebuttal to Argument in Favor of Proposition 209

THE WRONG THING TO DO!

A generation ago, Rosa Parks launched the Civil Rights movement, which opened the door to equal opportunity for women and minorities in this country. Parks is against this deceptive initiative. Proposition 209 highjacks civil rights language and uses legal lingo to gut protections against discrimination.

Proposition 209 says it eliminates quotas, but in fact, the U.S. Supreme Court already decided – twice – that they are illegal. Proposition 209's real purpose is to eliminate affirmative action equal opportunity programs for qualified women and minorities including tutoring, outreach, and mentoring.

PROPOSITION 209 PERMITS DISCRIMINATION AGAINST WOMEN.

209 changes the California Constitution to permit state and local governments to discriminate against women, excluding them from job categories.

STOP THE POLITICS OF DIVISION

Newt Gingrich, Pete Wilson, and Pat Buchanan support 209. Why? They are playing the politics of division for their own political gain. We should not allow their ambitions to sacrifice equal opportunity for political opportunism.

209 MEANS OPPORTUNITY BASED SOLELY ON FAVORITISM.

Ward Connerly has already used his influence to get children of his rich and powerful friends into the University of California. 209 reinforces the "who you know" system that favors cronies of the powerful.

"There are those who way, we can stop now, America is a color-blind society. But it isn't yet, there are those who say we have a level playing field, but we don't yet." Retired General Colin Powell [5/25/96].

VOTE NO ON 209!!!

PREMA MATHAI-DAVIS
National Executive Director, YWCA of the U.S.A.

KAREN MANELIS
President, California American Association of University Women

WADE HENDERSON
Executive Director, Leadership Conference on Civil Rights

Argument Against Proposition 209

VOTE NO ON PROPOSITION 209

HARMS EQUAL OPPORTUNITY FOR WOMEN AND MINORITIES

California law currently allows tutoring, mentoring, outreach, recruitment, and counseling to help ensure equal opportunity for women and minorities. Proposition 209 will eliminate affirmative action programs like these that help achieve equal opportunity for women and

minorities in public employment, education and contracting. Instead of reforming affirmative action to make it fair for everyone, Proposition 209 makes the current problems worse.

PROPOSITION 209 GOES TOO FAR

The initiative's language is so broad and misleading that it eliminates equal opportunity programs including:

- tutoring and mentoring for minority and women students;
- affirmative action that encourages the hiring and promotion of qualified women and minorities;
- outreach and recruitment programs to encourage applicants for government jobs and contracts; and
- programs designed to encourage girls to study and pursue careers in math and science.

The independent, non-partisan California Legislative Analyst gave the following report on the effects of Proposition 209:

"[T]he measure would eliminate a variety of public school (kindergarten through grade 12) and community college programs such as counseling, tutoring, student financial aid, and financial aid to selected school districts, where these programs are targeted based on race, sex, ethnicity or national origin." [*Opinion Letter to the Attorney General*, 10/15/95].

PROPOSITION 209 CREATES A LOOPHOLE THAT ALLOWS DISCRIMINATION AGAINST WOMEN

Currently, California women have one of the strongest state constitutional protections against sex discrimination in the country. Now it is difficult for state and local government to discriminate against women in public employment, education, and the awarding of state contracts because of their gender. Proposition 209's loophole will undo this vital state constitutional protection.

PROPOSITION 209 LOOPHOLE PERMITS STATE GOVERNMENT TO DENY WOMEN OPPORTUNITIES IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING, SOLELY BASED ON THEIR GENDER.

PROPOSITION 209 CREATES MORE DIVISION IN OUR COMMUNITIES

It is time to put an end to politicians trying to divide our communities for their own political gain. "The initiative is a misguided effort that takes California down the road of division. Whether intentional or not, it pits communities against communities and individuals against each other."

– *Reverend Kathy Cooper-Ledesma*
President, California Council of Churches.

GENERAL COLIN POWELL'S POSITION ON PROPOSITION 209:

"Efforts such as the California Civil Rights Initiative which poses as an equal opportunities initiative, but which puts at risk every outreach program, sets back the

gains made by women and puts the brakes on expanding opportunities for people in need."

– Retired General Colin Powell, 5/25/96.

GENERAL COLIN POWELL IS RIGHT.

VOTE "NO" ON PROPOSITION 209 –
EQUAL OPPORTUNITY MATTERS

FRAN PACKARD
President, League of Women Voters of California

ROSA PARKS
Civil Rights Leader

MAXINE BLACKWELL
Vice President, Congress of California Seniors, Affiliate of the National Council of Senior Citizens

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Rebuttal to Argument Against Proposition 209

Don't let them change the subject. Proposition 209 bans discrimination and preferential treatment – period. Affirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED. Programs designed to ensure that all persons – regardless of race or gender – are informed of opportunities and treated with equal dignity and respect will continue as before.

Note that Proposition 209 doesn't prohibit consideration of economic disadvantage. Under the existing racial-preference system, a wealthy doctor's son may

receive a preference for college admission over a dishwasher's daughter simply because he's from an "underrepresented" race. THAT'S UNJUST. The state must remain free to help the economically disadvantaged, but not on the basis of race or sex.

Opponents mislead when they claim that Proposition 209 will legalize sex discrimination. Distinguished legal scholars, liberals and conservatives, have rejected that argument as ERRONEOUS. Proposition 209 adds NEW PROTECTION against sex discrimination on top of existing ones, which remain in full force and effect. It does NOTHING to any existing constitutional provisions.

Clause c is in the text for good reason. It uses the legally-tested language of the original 1964 Civil Rights Act in allowing sex to be considered only if it's a "bona fide" qualification. Without that narrow exception, Proposition 209 would require unisex bathrooms and the hiring of prison guards who strip-search inmates without regard to sex. Anyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act.

Join the millions of voters who support Proposition 209. Vote YES.

DANIEL E. LUNGREN
Attorney General, State of California

QUENTIN L. KOPP
State Senator

GAIL L. HERIOT
Professor of Law